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A
COLLECTION
Francis Hargrave
OF
TRACTS
RELATIVE TO THE
LAW OF ENGLAND,
FROM
MANUSCRIPTS,

NOW FIRST EDITED
By FRANCIS HARGRAVE, ESQUIRE,
BARRISTER AT LAW.

V O L I.

Longis laboribus,—tamen dubiis, forsan adversis.

D U B L I N :

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THE chief object of the following collection is to call into general use a number of valuable manuscripts on the law of England, which hitherto either have been confined to the small circle of those few who visit public repositories of books, or have been destined to occupy private libraries in a state nearly dormant except to the particular proprietors. I represent this as the *chief* object; because the tracts, which I may occasionally risque from myself, will probably be too few in number, and from a consciousness of my own inferiority I fear too feeble in the execution, to deserve much consideration. If I succeed so far as to make a judicious selection of materials from the unpublished labours of others, I shall hold myself sufficiently fortunate to justify the present attempt; and for so much I am not wholly without hopes of meriting attention, being encouraged to indulge them by the course of my studies, and by the generality of my acquaintance with the writings on the law of England. Nor is it surprising, that there should be persons, who, however unequal to the attainment of eminence by their own writings, may yet be qualified to form some judgment of the works of others, and to separate such of them as may be entitled to general notice from those too mean to bear the public sight. Genius to execute and judgment to discriminate are distinct qualities: the latter may exist where the former is an entire stranger.

The occasion of my engagement in this undertaking was a present to me of two valuable manuscripts of lord Hale, from a gentleman eminent for eloquence at the bar and other splendid

and valuable accomplishments * ; whose frame of mind is such, that, where he feels a strong regard, he cannot resist the impulse of marking it by some considerable sacrifice to the use of the man he distinguishes by his friendship. One of these manuscripts is the first and principal treatise in the present volume : the other, which is a dissertation on the admiralty jurisdiction, will be hereafter introduced into the collection, if the undertaking shall be further pursued. Both are replete with knowledge so important to an English lawyer, that a professional person apprised of their contents could not avoid rating them highly. Yet this gentleman, the moment he perceived me struck with their value, renounced his own possession of them in my favor ; and this kindness, which wanted not any aid from manner, was greatly enhanced by the most handsome and warm expression of the motives inducing such attention to me. Delighted with a present so uncommon, I immediately considered, how I could best evince my sense of its value : and thence first arose the idea of the present undertaking ; for which I thought the two manuscripts thus conferred, with a prospect of some few I was aware of from public libraries, a sufficient stock to begin with.

Having resolved upon the attempt, I announced it to the public by a full explanation of the nature of it ; and I confess, that, from an unwise partiality to my own ideas of its utility, I was sanguine in the expectation of considerable encouragement in execution of my design. But I was soon mortified into a conviction, that the undertaking did not carry attraction enough to interest the generality even of legal and professional readers. The cause of this indifference, and whether it arose more from a distrust of my ability and industry to conduct such a publication, or from a doubt of there being a sufficiency of materials to form it, I do not presume to decide. But the effect upon my mind may be easily conceived. So cold a reception could not have any other tendency, than at least to check the zeal with which the undertaking was planned, and, to raise a doubt, whether seeming to be thus unacceptable it ought to be further prosecuted. Accordingly my feelings were so hurt, that I was upon the point of retreating. But a further consideration determined me to complete the first volume of the proposed collection, for which I had already made such considerable preparation. However, as I am now instructed by experience to indulge little

* George Hardinge, esq. solicitor-general to the queen.

hope of exciting any considerable attention, there cannot be much room for new disappointment.

It was no small inducement to me so far to persist in the publication, that my disappointment in not being able to attract more general attention to the undertaking, was in some degree recompensed by the countenance which it received from several respectable persons, who condescended to give proof of their anxiety to contribute or point out materials for it. And here I think it right to explain, to whom my acknowledgements, exclusive of those already made to the friend whose present of manuscripts first caused my thinking of such a collection, are in this respect more particularly due.—My excellent friend, the honorable John St. John, esquire, to whom I am under great obligations on various accounts, and whose constancy of mind I have experienced for a course of years, evinced his extreme anxiety for the undertaking the moment it was announced, by a zeal for it, which to those who understand what friendship is will want no apology, however unanswerable this collection may prove to his too partial and sanguine expectations.—By one gentleman of established name in the literary world *, I was invited to examine the valuable collection of manuscripts in the Inner Temple library: and in order to render my access easy and agreeable, he and another worthy member of the same society then treasurer of it † politely attended to receive me in the library-room; each exhibiting such a marked attention to my pursuit, as will always impress my mind with a sense of obligation to them.—From another gentleman ‡, whose flowing talent of good-humoured wit renders him so valuable as a companion, and whose other faculties qualify him for distinction at the bar, I received the liberal tender of his whole stock of law manuscripts, amongst which were various unpublished tracts by lord Hale.—A fourth gentleman §, who, though still in an early stage of life, has published enough to prove, both that he has acquired an unusually extensive information concern-

* The hon. Daines Barrington, esq.

† Thomas Barton, esq.

‡ Joseph Jekyll, esq. barrister at law, great nephew of sir Joseph Jekyll, formerly master of the rolls.

§ Sir John Sinclair, baronet.

ing the finance and resources of his country, and that his mind is actuated by a laudable zeal to uphold the national credit, honoured me with a short manuscript on offices and the election of officers in England according to the ancient law, from the famous mr. Pymme's papers, and written in 1641.—One of high rank amongst the judges*, whose benevolence of heart interests him whenever he can do a kind or friendly action, anxiously endeavoured to secure for me the use of lord Hale's valuable collections on the rights and prerogatives of the crown: and with the same view a friend †, whose invaluable worth of mind endears him to all his connections, and whose extraordinary professional knowledge is most justly advancing him rapidly at the chancery bar, interposed himself for me by various applications. My respected friends Mr. Henry Hoyle Oddie and Mr. Edmund Estcourt also interposed their good offices for the like obliging purpose. Notwithstanding also that these attempts in my favor have not hitherto produced the whole of the desired effect; yet they have been attended with an introduction of me to the acquaintance of the present worthy possessor ‡ of lord Hale's original manuscripts, and also to the advantage of an occasional access to them.—The very learned and ingenious continuator of the new edition of Coke upon Littleton, from the first moment of his being apprised of the present undertaking, has given very frequent proofs of his anxiety to furnish materials for assisting me in its prosecution. I am the more happy to acknowledge this unreserved and liberal spirit of communication; because it furnishes me with a convenient opportunity of at the same time confessing, how great my obligation to this gentleman is, not only for spiritedly and disinterestedly enterprizing to complete what I found too arduous to bring to a proper conclusion; but for changing my reluctant desertion of a favorite work in an unfinished state, into an important advantage to those, who might otherwise have had cause to complain of injury. About two years ago, when I published my farewell address to the public on consigning that work to the care and protection of Mr. Butler, I avowed my confidence, that he would confer upon the new edition of the Coke upon Littleton much

* Lord chief baron Skynner.

† John Mitford, esq.

‡ John Blagden Wale, esq.

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greater value than could be reached by the most vigorous efforts from myself. What was then conjecture, founded on my high opinion of the character of this gentleman for talents, learning, and assiduity, is now become a real fact, by such a successful performance of his engagements, as even exceeds what I so unhesitatingly promised for him.—Further I have lately been surprized with an unsolicited communication of some papers in the hand-writing of lord Hale from a gentleman *, who is possessed of various manuscripts formerly belonging to Robert Gibbon, esq. one of his lordship's executors, and who has obligingly promised to make a more minute examination of them for my use. The principal paper thus sent is a rough draught of the more finished work which forms the first article in this volume, but with a different title; this first essay being stiled, "A NARRATIVE, legal and historical, touching the Customs."—To this list of obligations, I beg leave to add my strong acknowledgements of the most obliging attentions from Henry Cowper, esquire, assistant clerk of parliament; from my worthy friend Mr. Wallwyn Shephard; from Thomas Astle, esquire, keeper of the records at the Tower; from Thomas Chapman, esquire, one of the secondaries of the court of exchequer; from the Reverend Mr. Harpur and the Reverend Mr. Ascoug at the British Museum; and from a learned though young barrister of Gray's Inn, for whom I have a sincere regard †.—Nor can I with justice withhold my sense of the attentions, which the present undertaking has uniformly experienced from my near and highly esteemed relation, the Reverend Mr. Smith Hargrave; who, from the commencement of it, has not merely assisted me in conducting it with his advice and in other respects, but by the frequency of his persuasions has been a chief cause of at length urging me into the completion of the present volume. Without this mark of regard from the last-named gentleman, he had sufficient claims upon me; as well in respect of my friendship for him personally, as from a series of the most essential benefits conferred upon me in the very early part of my life, by his most excellent father, the deceased Major Hargrave; the remembrance of whose generous kindnesses as an uncle, and of whose exemplary virtues as a soldier and man, will ever be dear to me.

* Mr. Beardsworth, of Lincoln Inn,

† John Baynes, esquire.

I shall now proceed to offer some explanations and remarks, concerning the several tracts in this volume, in addition to the notice I have prefixed to each of them.

I.

The first piece in the volume contains a great abundance of important history and information relative to the CUSTOMS and various other titles of English law; on some of which subjects, at least for the period of which the author treats, there is little at present in print, but loose and desultory matter. In this learned treatise the reader will find the same luminous order in the distribution of subjects, the same uncommonness of materials from curious records and manuscripts, the same profoundness of remark, the same command of perspicuous and forcible language, with the same guarded reserve in offering opinions on great controverted points of law and the constitution, as characterize the legal writings of lord Hale heretofore published.

A sensible and pleasant, but very prejudiced, writer †, whose life of his brother lord keeper North is full of interesting anecdotes about the principal lawyers in the reign of Charles the second, and on that and other accounts deserves to be read by all students of the law, has anxiously labored to depreciate the character of lord Hale with posterity. Into this invidious office he seems to have been precipitated by two very powerful influences over the human mind.—One was of an amiable kind, being an extreme affection for his brother the lord keeper, whose pretensions to fame were beyond all doubt very high, but whom he wished to lift into rivalry of character with lord Hale himself.—The other was an over-violent party-zeal, which ill suited with lord Hale's temperate line of conduct in the contentions between the crown and people. Mr. North was, what he describes his brother the lord keeper to have been, a monarchist declared; in consequence of which he was far too indulgent to excesses of royal authority. But lord Hale, though sincerely hostile to all irregularities attempted against the crown, was at the same time so averse to all encroachments under the sanction of prerogative, that he could neither be awed nor won into any compliances having that tendency.—Being so swayed into a sort of enmity towards lord Hale, the agreeable

† The Hon. Mr. Roger North.

biographer, to whom I allude, exhibits a very injurious portrait of our most reverend judge; for such a colouring is given to this great and inestimable man, that all his numerous good features are endeavoured to be spoiled or obscured, and the few imperfections incident to him are multiplied and exaggerated. Thus we see his abundant piety degraded into the lowness of an excessive puritanical prejudice, his extreme humbleness of mind distorted into self-conceit and vanity, his manly, independent spirit as a judge sunk into a mean and fearful courting of popularity. We see also his private weaknesses commemorated with triumph; and his writings out of the line of the law, especially his famous treatise on the origination of mankind, extravagantly ridiculed and despised: and as to his steady and uniform attachment to the real constitution of his country, it is confounded with the wild enthusiasm of those, who blindly or corruptly aimed to extirpate the monarchy, and to establish on its ruin the specious tyranny of pretended republicanism, or to introduce the still greater calamity of successive anarchy. Nay, his most exemplary justice is not spared; in arraigning which, however, the honourable writer's prejudice betrays him into the most palpable inconsistency. For in many passages the reader is instructed to consider lord Hale as an inveterate enemy to the crown, and as seldom impartial where the anti-court party was concerned in a cause. Yet in one place of the same book we are told, that "when he knew the law was for the king, as well he might, being acquainted with all the records of the courts to which men of the law are commonly strangers, he failed not to judge accordingly:" and in another place lord keeper North is made to say, that "whilst lord Hale was chief baron of the exchequer, by means of his great learning, even against his inclination, he did the crown more justice in that court, than any others in his place had done with all their good will and less knowledge.

But notwithstanding the shafts of invective thus industriously thrown at lord Hale, enough has escaped from their singular author concerning his lordship, to confirm the unequalled eulogiums heaped upon him both as a judge and a law-writer by his other contemporaries, and so to convert the enemy of his high fame into the most convincing witness of its having been both fully possessed and superabundantly deserved.

deserved. The passages, to be met with in justification of this remark, are occasionally interspersed; but being collected into one point of view must I think strike the most insensible reader. It is part of the biographer's own representation of lord Hale,—that “his opinions were by most lawyers “and others thought incontestable:”—that “the generality, “both gentle and simple, lawyers and laymen, idolized him “as if there never had been such a miracle of justice since “Adam:”—that “his voice was oracular, and little less “than adored:”—that “he was allowed on all hands to be “the most profound lawyer of his time:”—that “even “lord keeper North revered him for his great learning in “the history of law and records of the English constitution:”—and further that “his collections and writings of “the law were a treasure, and being published would have “been a monument of him beyond the power of marble.”—To these testimonies from Mr. North himself should be added the two passages I before appealed to; according to the obvious construction of which it is manifestly confessed, not only that lord Hale was better qualified than any other judge to explore the rights of the crown, but that he always declared them when the law warranted it; and that thus, by the union of superior knowledge with the severest impartiality, he had actually done more for the crown in that respect, than any of his predecessors the most devoted to the claims of regal prerogative with all their partiality had been able to effect.—All these passages, even in spite of the wishes of the writer, whose declared object was to lessen the estimation of lord Hale, tend to fix the character given of him by his warmest admirers, or rather to elevate it above their description, if in truth there was room for higher encomium than they have bestowed. But what seems most remarkable in these testimonies for lord Hale from the foe to his fame is, that one part of the merits conceded to him obviates the chief objection made to his judicial character, to sink which was clearly one great motive to the attack of him. The leading feature of lord Hale as a judge, which his censurer strives to impress upon his readers as a genuine characteristic, most certainly imports, that, in the exercise of his judicial function, he was greatly and continually under the dominion of an obstinate prejudice against the court, and of a proportionable predilection

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predilection for the opposite party. But surely this impression cannot have long currency with any considerate reader; when the same person in effect tells us, that where the crown was concerned lord Hale sought to find what the law was, and having found declared it accordingly. As I construe these two representations, it is imputing the grossest partiality in principle, and the purest impartiality in practice, to the same judge, almost in the same breath; and if this inconsistency be fairly chargeable, the destruction of character intended may be said to operate like a strong poison, accidentally so combined with and unqualified by antidotes, as to become a most salutary medicine.

Upon this view of the character of lord Hale, as it may be deduced from the writings of the only detractor from his name I have met with in print, I presume to hope, that I shall stand excused for the avidity, with which I now appear as the editor of a part of his hitherto unpublished legal collections. At the same time I wish it to be understood, that in adverting so much to his reputation I had something of more importance at heart, than merely to found an apology for myself, or to increase the attention of the public to any part of the collection now offered to them. I acknowledge, that I am also actuated by an anxiety to preserve the fame of lord Hale inviolate.—Abstractedly considered he commands so much respect, that it seems scarce consistent with an ordinary portion of sensibility to be indifferent, whether the high estimation of such a person shall continue undiminished, or shall for a moment be shaken by the invectives of any writer, however deserving of attention on any other account.—Besides, our gratitude ought to interest us in behalf of lord Hale. Men, who sustain high judicial situations with transcendent abilities and perfect integrity, have the strongest claims upon the gratitude, as well of posterity, as of the times in which they live; because the fruits from their administration of justice are of a permanent kind, the benefit insensibly passing through the first partakers, and so becoming diffused for the use of succeeding generations. In the instance of lord Hale, this claim upon our gratitude is enhanced by another service of almost equal weight. So incessant and severe are the labours of the mind incident to an effectual discharge of the judicial function, that few of

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our judges have attempted in any degree to illumine the intricate science of law by the splendor of their writings; the most eminent and industrious of them having seldom contributed any thing, except mere notes of the cases adjudged in their own times. But lord Hale, not content with his acknowledged pre-eminence as a judge, performed a double service; for he added to the fatigues which official duty exacted, a voluntary sacrifice of his hours of retirement to the toil of writing, for the noble and generous purpose of methodizing and illustrating the laws of his country. In pursuit of this object he submitted to the most difficult and painful researches; drawing his materials more from the secret and difficult recesses of ancient records and other rare manuscripts, than from printed books. So regardless too was he of expence, in this mode of obtaining lights for the darker subjects of law, that, notwithstanding the narrowness of his fortune * and the largeness of his family, those manuscripts alone,

* The smallness of his fortune at the Restoration, when he was above 50 years of age, and had derived the benefit of a long and successful practice, is noticed in the following imperfect paper; which contains lord Hale's reasons for labouring to decline the high judicial office then intended for him. This fragment explains the state of his mind at that critical period of our history so fully, that I presume it cannot but be acceptable to the curious reader.

“ Reasons, why I desire to be spared from any place of public employment.

“ I. Because the smallness of my estate, the greatness of my charge, and some debts, make me unable to bear it with that decency which becomes it, unless I should ruin myself and family. My estate not above 500 l. per ann. six children unprovided for, and a debt of 1000 l. lying upon me.—And besides this, of all things it is most unseemly for a judge to be necessitous. Private condition makes that easier to be born and less to be observed, which a public employment makes poor and ridiculous.—And besides this, it will necessarily lift up the minds of my children above their fortunes, which will be my grief and their ruin.

“ II. I am not able so well to endure travel and pains as formerly. My present constitution of body requires now some ease and relaxation.

“ III. I have formerly served in public employment under a new odious interest, which by them that understand not, or observe not, or will willingly upon their own passions or interest mistake my reasons for it, may be objected even in my very practice of judicature, which is fit to be preserved without the least blemish or dispute in the person that exercizeth it.

“ IV. The present conjuncture and unsettlement of affairs, especially relating to administration of justice, is such, the various interests animosities and questions so many, the present rule so uncertain, and the difficulties so great, that a man cannot, without loss of himself or reputation, or great disobligations, exercise the employment of a judge, whose carriage will be strictly ob-

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stone, which at his death he gave to Lincoln's Inn, cost him about fifteen hundred pounds; a sum which, as he left an estate not quite 900*l.* a-year, was according to the probable price of lands at his death equal to a very considerable part of his whole fortune. In consequence of his thus devoting himself to the public good, we of the profession of the law in the present time may continually profit by the study of so much of his law-writings, as have been already published; and unless I deceive myself by an imaginary value, we may also expect like important aids from his unpublished collections, as they shall gradually appear in print. Nor is it a small part of the benefits already derived to us from lord Hale, that a late distinguished commentator on our laws was so greatly assisted in forming the plan of his elegant institutions. As may be collected from what himself candidly avows, the

served, easily misrepresented, and severely censured, according to variety of interest. And I have still observed, that almost in all times, especially upon changes, judges have been ever exposed to the calumny and petulance of every discontented or busy spirit.

"V. I have two infirmities, that make me unfit for that employment.—

1. An aversion to the pomp and grandeur necessarily incident to that employment.—2. Too much pity, clemency, and tenderness, in cases of life, which may prove an unseizable temper for building

"VI.

"VII. I shall lose the weight of my integrity and honesty by accepting a place of honour or profit, as if all my former counsels and appearances were but a design to raise myself.

"VIII. The very engagement in a public employment carries a prejudice to whatsoever shall be said or done to the advantage of that party that raised a man, as if it were the service due to his promotion. And so, though the thing be never so just, it shall carry no weight, but a suspicion of design or partiality.

"IX. I am sure, in the condition of a private man declining preferment, my weight will be three to one over what it will be in a place of judicature.

"X. I am able in my present station to serve my king and country, my friend, myself and family, by my advice and counsel.

"XI. I have of late time declined the study of the law, and principally applied myself to other studies, now more easy, grateful, and seasonable for me.

"XII. I have had the perusal of most of the considerable titles and questions in law, that are now on foot in England, or that are likely to grow into controversy within a short time. And it is not so fit for me, that am preingaged

the outline of that fine work is in great measure a superstructure raised on the foundation of lord Hale's previous digests and distribution of the subject, in that short but wonderful emanation of his mind, the "ANALYSIS of the CIVIL PART of our LAW;" which is of so peculiar a value, that even the labours of a Blackstone in the same track have not sufficed to supersede its use. So great indeed is the confidence of professional men in the assistance furnished to us by lawyers such as lord Hale, that, instead of going to the fountain-head for new supplies, we of the present age place our chief resource in the materials to be found in their works, and rarely attempt any thing beyond an application of the knowledge they contain. Thus, therefore, subsisting as it were on the stock of learning treasured by lord Hale, lord Coke, and a few others of the last century, surely the least return we can in justice make to such great benefactors is, to give their characters all possible protection against the outrages of invidious calumny.—There is another consideration, which ought to render us, as friends and lovers of our country, very anxious to guard lord Hale's character from unjust reproach. The public at large ever have a strong interest in the fame of great and distinguished citizens; and never perhaps was that interest of more value, than it is in the present æra. High estimation of character is one of the brightest and dearest

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"in opinion, to have these cases fall under my judgment as a judge, as I need must either upon trials or judgment.

"If it be objected, that it will look as a sign of the displeasure of the king against me, or of a disserviceable mind in me towards the king, if I should either be passed over or decline a preferment in this kind; I answer, that neither can reasonably be supposed.

"1. In respect of my present condition as serving in the house of commons which excuseth the supposition of either.

"2. His majesty's good opinion of my fidelity may be easily manifested; and my fidelity and service to him will be sufficiently testified by my carriage and professions.

"But if after all this there must be a necessity of undertaking an employment I desire,

"1. It may be in such a court and way, as may be most suitable to my course of studies and education.

"2. That it may be the lowest place that may be, that I may avoid envy. One of his majesty's counsel in ordinary, or at most the place of a puisne judge in the common pleas would suit me best."

Here it is observed in the manuscript book, from which what precedes is copied, "that *desunt multa*, the paper being torn."

wards, which can be bestowed upon us in our sublunary
 tion; consequently it is one of the most powerful incen-
 es to great and good actions. In proportion, then, as
 s reward is effectually secured to those who earn it by
 air virtuous toils, we may count upon a greater or less
 mber of men to preserve the state from the wide-spreading
 generosity of the times, and other numerous perils by which
 have been long threatened. But if the temple of honour
 to be profaned, by displacing such an assemblage of public
 d private virtues as lord Hale from the high situation he
 en before his death filled there, what mortal, however ca-
 ble of the most essential services to the state, can presume
 hope for a permanent possession of the fame, which ought to
 ult from them; and when all hope of a solid fame shall
 come extinguished, how can we expect from the infirmity
 human nature, especially in such an age as the present
 e, any thing like efforts by great actions to obtain such
 h reward?—In a further point of view also, successful de-
 ction of great characters tends to produce a public mis-
 ef; for if it shall be found possible by misrepresentation
 destroy all esteem for such exemplary persons as lord
 le, it may disseminate an idea, amongst all classes of so-
 ty, that the perfection of virtue attributed to the distin-
 lished citizens of former times is a mere imagination; and
 uld this persuasion circulate, we cannot but expect a ra-
 ncrease in the strides towards national depravity. Much
 etical virtue must not be looked for, where the existence
 any is generally disbelieved.

Here then I shall leave the character of lord Hale with
 confidence, that liberal-minded readers will easily forgive
 ; though by so fully considering the only reproach ever
 mpted to be fixed upon him, I may have passed the
 st bounds of a preface to a volume, in which his lord-
 s writings are only to form a part of the collection.

In respect to the particular contents of the treatise, which
 led to this digression about lord Hale, they so fully ap-
 r from his own titles to the books and chapters, as al-
 st to preclude every explanation from me. So happily
 eed are the divisions of the chapters of the work expres-
 that, if he had not given any thing more, it would
 e so opened the mind of every person adequate and ac-
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customed to legal subjects, as to be a most profitable instruction. The titles of the chapters are explicit in teaching the order and manner, in which the subject ought to be investigated and considered; and therefore had not the author executed his own excellent plan, they would have been a fine outline for some future studious and learned man to fill up, by gathering and digesting the requisite materials.

However, I have something to offer, not only concerning the general design of the treatise, but also concerning some few subjects of consequence which are considered in the course of it, or affected by its contents.

The main and leading purpose of the author certainly was to give a legal history of the customs, from their earliest infancy, to the Restoration, and for some few years after. The first and second parts of the treatise, which concern some collateral subjects having affinity to the ports, and the ports themselves, must therefore be considered merely preliminary and introductory; though from the profound learning with which they are executed, they furnish information frequently new and almost always important. In the third part, after pursuing his subject historically through every reign of the previous period, he shews the great settlement of the customs, effected by the act of tonnage and poundage passed immediately on the Restoration: and what is very material to the present times, as that act is still the chief foundation of the revenue from the customs, the duties imposed by subsequent statutes being ever in some degree referable to it. He adds several chapters on payment of the duties, in the course of which we see, in the most authentic and authoritative form, what were the adjudications of the court of exchequer on the collection of this branch of public revenue, which lord Hale presided as chief baron.—What induced lord Hale to labour so profoundly and anxiously on the subject of the customs, more especially in the early and dark periods, do not observe to be any where particularly explained by himself. But when it is recollected, that in the younger part of his life, the claims of the crown to tax the ports by prerogative had been sanctioned even by the judges *, and that

* This will appear by the judgment of the court of exchequer given in the early part of our first James's reign, in the great constitutional cause between the crown and the merchants.

this dangerous pretension did not receive its final death-wound, till it was in exprefs terms declared contrary to law by the first act

crown and mr. Richard Bates a merchant of London, which is usually called the CASE of IMPOSITIONS. In the eleventh volume of the State Trials, almost every thing relative to that famous case is industriously brought together in one point of view by the present editor. The collection there made begins with the printed report of the case, as argued before and determined by the barons of the exchequer in 1607, from Lane's exchequer cases. This is followed by sir John Davis's argument in favour of a prerogative to tax the ports from a manuscript first printed in mr. Carte's History of England. Next are given sir Francis Bacon's speech in parliament in 1610 for the same prerogative, with two most eloquent and elaborate speeches of mr. Yelverton and mr. Hakewill against it. Then there follows the petition of grievances addressed by the house of commons to king James in the same year, a principal object of which was to condemn impositions at the ports by regal authority, as an infringement of one of the most fundamental and sacred points of our constitution. After this there is inserted the speech of sir Francis Bacon to the king on presenting this petition of grievances. To the whole of these collections relative to the CASE of IMPOSITIONS, the present editor has prefixed, not only a reference to most of the printed books which contain any thing on this important controversy between the rights of parliament and the claims of the crown; but a general review of the various attempts, made between the accession of James the first to the crown of England and the commencement of the civil wars in the reign of his immediate successor, to establish a system of prerogative taxation; with a short explanation, how each mode of attack upon the constitution in that respect was successively combated, till a complete and decisive victory was gained over the whole plan thus projected in favour of an illegal extension of the royal prerogative. This note of the present editor on Bates's case being so connected with the chief subject of the first and principal tract in this volume; he therefore takes the liberty of here giving, with some small alterations and additions, the following extract from it:

" This famous CASE of IMPOSITIONS involved in it a constitutional question of the first magnitude; mr. Bates the defendant having been prosecuted for refusing to pay a duty on foreign currants imposed by a mere act of the crown. The attempt, to enforce a submission to this duty by legal process, was certainly a principal and early part of that rash and unwarrantable scheme to establish in the crown a right of taxing the subject, which disturbed the reigns of the two first princes of the *Stuart* line. James the first claimed the right of imposing duties on imported and exported merchandize by prerogative. His son and immediate successor, the unfortunate Charles, not only persisted in claim, but added to it the equally formidable pretension of ship-money. Realized, these claims, with loans, benevolences, dispensations, monopolies, and the other subsidiary branches of the same extravagant design, would have comprized nearly a complete system of extra-parliamentary taxation; for imposition at the ports was calculated to serve the purpose *externally*, ship-money to operate *internally*. Had they been acquiesced in, parliaments would have become unnecessary assemblies: the mildness of a limited monarchy would gradually have degenerated into the harshness of an absolute one: a legal government would have been corrupted into a tyranny. To the great disgrace of the profession of the law, some, who in other respects were its brightest ornaments, gave their aids to such attempts against the rights of parliament. We make the acknowledgment with concern; but it is a truth, which neither can nor ought to be concealed. The great luminary of science, lord Bacon, exercised his eloquence to reconcile parliament to impositions by prerogative. Sir John Davis, so justly admired for his writings about Ireland and his Reports, composed a treatise to prove the right of the crown. Both displayed the greatness of their talents on the occasion, though they managed the argument in different ways; the former speciously professing

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act of tonnage and poundage passed by the long parliament in the reign of the first Charles, and this declaration was repeated

“ to claim the prerogative in question from and to limit it by law; the latter
 “ boldly adventuring to exalt the same prerogative above law, and describing it
 “ to be like another Sampson, too strong to be bound. 2. Bac. 4to. ed. 1778.
 “ p. 213. Dav. on Imposit. 131. Even the judges deigned to be instruments for
 “ subjugating their country to an illegal taxation. Though it was incontroverti-
 “ ble, that, by the fundamental policy of our constitution, the legislature consisted
 “ of king lords and commons in parliament assembled; though the judges had be-
 “ fore them the strong testimony of lord chancellor Fortescue in his famous book
 “ *DE LAUDIBUS LEGUM ANGLIÆ*, that even in the reigns of Henry the sixth
 “ and Edward the fourth the English monarchy stood distinguished as *limited* from
 “ the French monarchy as *absolute*, notwithstanding their original resemblance to
 “ each other; though this noble-minded lord chancellor had instructed the *bar*
 “ *apparent to the crown*, that one of the most essential differences between the
 “ two monarchies arose from the prevalence of the king’s despotism of taxation in
 “ France, and from parliament’s having that power in England; though they
 “ could not but know, that from the moment the king should succeed in attracting
 “ from parliament the commanding power of taxation, parliament must have pe-
 “ rished; though the statute-book was full of legislative declarations against taxes
 “ without consent in parliament, and these declarations reached back almost as
 “ far as there is any testimony from parliamentary records; though not so much
 “ as one clear recognition of the claim could be found in the records of justice:—
 “ notwithstanding all this, the court of exchequer in Bates’s case unanimously
 “ gave judgment for impositions by prerogative on imports and exports. In *Mr.*
 “ *Hampden’s* case also, notwithstanding that some very recent admonitions and
 “ warnings of duty had intervened, the judges of Westminster-hall, *two only ex-*
 “ *cepted*, joined to give the sanction of a judicial opinion to ship-money. Nor
 “ were monopolies loans and benevolences wholly uncountenanced by the courts of
 “ justice. But, during this crisis, the two houses of parliament did not forget their
 “ duty. They pursued the several devices for illegal taxation, till all were hunted
 “ down, and had yielded to the tide of law and constitution. In 1610, the house of
 “ commons, alarmed by the judgment in Bates’s case, and having ransacked the re-
 “ cords of the kingdom for proofs, they then formally debated the right of the crown
 “ to impose on merchandize at the ports; and at length, by a petition to the king,
 “ complained of such impositions as one of the most dangerous grievances; and this
 “ in the subsequent parliaments was followed with frequent remonstrances of the
 “ like kind. In 1623, monopolies were curbed and regulated by statute. In 1627,
 “ gifts loans and benevolences were pointedly declared contrary to law by the peti-
 “ tion of right, with general words to comprehend all sorts of taxes and charges out-
 “ of parliament. In 1640, the legislature crushed ship-money almost in its birth
 “ by declaring the judgment for it contrary to law and vacating the record. In the
 “ same year the final blow was given to taxation by prerogative; an act for tonnage
 “ and poundage being passed, with a declaration in it against the king’s claim to
 “ impose such duties.—Thus the victory over all the several inventions to tax the
 “ subject by prerogative became complete: before the civil wars broke out, before
 “ the contest with the crown degenerated from resistance of usurped powers into a
 “ invasion of just claims. Fortunately too, when the country emerged from the
 “ aparchy and misery of the scene which followed, the extravagance of joy did not
 “ extinguish a due remembrance of the constitution. One of the first acts, after the
 “ restoration, was a grant of tonnage and poundage, with words, which renewed
 “ part of the former declarations against taxing by prerogative; for it anxiously
 “ recited, that *no rates can be imposed on merchandize imported or exported by sub-*
 “ *jects or aliens but by consent in parliament.* 12 Cha. 2. c. 4. sect. 6.—It was one
 “ of our intention to have traced more fully the history of the long contest about tax-
 “ out of parliament, from the accession of the house of Stuart, till it was finally
 “ decided for I.

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repeated in a parliamentary grant of the like kind after the Restoration; it is not an improbable conjecture, that lord Hale was induced to engage in so laborious

decided against the crown in 1641; our plan being to have minutely and distinctly stated the proceedings on each species of device to elude the constitution, and to have given a general view of the arguments by which each was sustained or repelled. But though we had already made many researches, and collected many materials on the subject; it was found impossible to do justice to it, without more time than was consistent with present convenience to allow. We therefore reserve the detail of the subject for some future occasion. As to the attempts at extra-parliamentary taxation in the previous period, they are investigated in some of the pieces which are now presented to the reader."

Slight and general as the foregoing review of the struggles for a prerogative of taxation is, it may have some use; because it may serve to prepare the mind of the reader for and assist him in facilitating a deep study of the subject. But so great a point of the constitution ought to have a full and particular history, both for the time antecedent to the accession of James the first as king of England and for the subsequent period; and as appears from the extract before made, such a history has been long meditated by the now editor, from a persuasion, that it would not only demonstrate the antiquity of our present constitution, but throw abundance of light upon various collateral matters relative to the *jura coronæ*, and so contribute to laying the foundation for a more ample and digested account of that vast and high title of our law, than has hitherto appeared in print.

Though this annotation is already so long, the editor cannot resist the temptation of lengthening it, by some additional remarks on the rashness of the measures taken by James the first and his immediate successor, to wrest from parliament the power of taxing the subject, and to fix it in the crown singly.

So far as respected the general point of taxing by prerogative, it seems to have been the strongest of all cases against the crown. There were such apparent bars to the claim of prerogative in this respect, that it seems surprising, how lawyers of eminence could submit to the drudgery of being advocates in such a cause. If James had found himself strong enough by military force to change the form of government, and to substitute for it a despotic sovereignty in the crown, however monstrous such an abuse of his public trust would have been, its meaning could not have been doubted; for it would have amounted to saying, "I confess the present constitution is otherwise, but I chuse to make a new one; *sic volo, sic jubeo, set pro ratione voluntas*. However unjustifiable it may be, I will have it so." But whatsoever the inclinations of James the first and his son the unfortunate Charles might be, either they were not in a condition to risk being thus explicit, or did not the courage to try their force: and this being so, the difficulty of accomplishing their design against the constitution became great indeed; for the great point of argument both on the principle and fact of the constitution were in the teeth of prerogative taxation,—whether the attempt had been made in the large and short way, by at once insisting, that the power was inherent in the crown and exerciseable about the two houses of parliament,—or, as the experiment was tried, in the small way, by taking advantages of all the irregular practices of former times, and by joining certain allowed rights and prerogatives into abuse, and so giving to them the colour and pretext of a right of a far higher class. It could not be denied, that the legislative power was by our constitution in the king lords and commons. To argue the next moment, that, notwithstanding this, there was latent in the crown a power of taxing, was an inconsistency in principle; for it was saying in the same breath, that the king was and was not the legislature; taxing the subject being undeniably one of the highest exercises of legislative authority. Nor was the argument the matter of fact much better for the crown. As far back as the reigns of Edward

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ous a research, by zeal for the constitution in one of the great points so essential to its continuance in a vigorous state.

ward the first and Edward the third, that is, almost as far back as the records of parliament, those most authentic sources of our constitutional history, can be traced the king has joined with the two houses of parliament in most explicitly declaring that to tax in any other manner than in parliament is contrary to the law of the land and that all other forms of taxation are strains of regal power incapable of being justified. It also happened, that exclusively of such general legislative declaration against taxing out of parliament, there was scarce any particular mode of illegal and irregular taxation, but what at one time or another had been specifically condemned. It was no wonder therefore, that Lord Coke, when he framed the petition right in the reign of our first Charles, laid his foundation against the prerogative of taxing, as well as against the other excesses of that ill-advised prince, on the code of our ancient statute law; for it is observable, that, throughout that famous declaratory law every proposition is derived from that highest of all sources for constitutional knowledge. Here one might easily imagine lord Coke, then nearly of the age of eighty years, to address himself exultingly to the speaker of the commons to this effect: "I propose to the house, not a theory of the best kind of government; not a change of our constitution in the way of improvement: but the solemn declaration of our actual and subsisting constitution; one honorably derived to us from our hardy ancestors, one capable of being proved by testimony from the earliest records of parliament; one, which has subsisted for centuries, and survived both the calamity of various and long civil wars, and the tyranny of successive ill administrations of our government, even the sanguinary reigns of the two first princes of the Tudor line; nay, one, which even they found it convenient to add new sanctions to, by resorting to its forms to give currency to their despotism and cruelty." Thus strongly fenced with the highest possible testimonies for a mixed and limited monarchy, I wave all inferior proofs. I might perhaps evince from our ancient story, that in all periods of time there was a freedom in our constitution; that it was free to our British, to our Danish, to our Saxon, nay to our Norman ancestors; and that it was beyond the power of traditionary fable to name the period, when our monarchs were unshackled by parliaments. I might perhaps trace the antiquity of our present legislative constitution, as composed of king, lords and commons, or at least the substance of it, as far back as the time when the Roman government ceased amongst us. But I will not travel unnecessarily into such remote periods: I will not unnecessarily waste the precious time of the house, or even my own time, in such traditionary and dubious investigations. I will leave all these topics to the curious antiquarian as his proper employment, or reserve them for the pastime of private curiosity. Confident in the strength of parliamentary records, I will appeal to them only. If they are not decisive in favour, or as I should rather say in favour of the constitution and against monarchical despotism, I yield the victory to the devotees of the crown: I agree, that the king shall singly exercise that highest power of legislation, the power of taxing; I agree, that from henceforth the king of England shall be a tyrant; and that the realm of parliament shall expire here, as it has expired in almost every other country of Europe. I will not even ask for aid from the testimony of that honest and generous lawyer, that high example of judicial chastity, that undefiled servant of the court royal, the great lord chancellor Fortescue. Even his admired printed book *De Laudibus Legum Angliæ*, and the still more valuable remains of him in a manuscript treatise on the difference between *absolute and limited monarchy*, if not suppressed, I ask only to put into my scale of a free constitution, and of a limited monarchy, the *statute rolls and other records of parliament*. Save *these only*, I consent to put into the scale of regal prerogative, all the fables of British antiquity, all the traditions of our Gothick ancestors, all the imperfections of monkish annalists, all the vague arguments from the vague titles of Saxon and Anglo-Norman laws, all the deceptive verbal criticism from words

See 1. Rushworth
550.

But, be this as it may, no undertaking could in my conception have been better calculated, either to justify the declaration of parliament on this head, or to demonstrate by the most

longer clearly understood, all the volumes of precedents of irregular and condemned practices; nay even the vain arguments from the uncertain origin of the representative part of our English parliaments, with the boasted argument from the arbitrary administration of the executive magistrate whilst our throne was filled with the proud Tudor line. Allow to me the benefit of the *magna charta* of our third Henry as confirmed by our first Edward, with the long series of subsequent statutes and parliamentary records; especially the 34. of our first Edward against *tallies* and *aids* without consent of parliament, the 25. of Edward the third against *forced loans*, and the statutes of the last-mentioned king with those of the second and third Richards against *benevolences* and *such like charges*. Those on the other side shall have the full and sole benefit of all other records and testimonies whatever; with the additional weight of the king and his whole court; without excepting his accomplished but too pliant judges, or those indefatigable hunters of precedents for violations of constitutional government, the great law officers of the crown. Should the ponderous weight of royal charters and parliamentary records fail me against such an aggregate of influences in the opposite scale, I will agree, that the constitution of parliament must perish; and that our kings must in future be absolute and despotic sovereigns.—Though too my scale, in consequence of the wisdom, integrity, justice, and firmness of this present house of commons, should at present preponderate; yet from the increasing degeneracy of those out of this honourable house, I prophesy, that the high talents with the low ambition of future lawyers will soon again counteract our present solemn proceedings against the excesses of royal prerogative; and that future judges will soon arise to countenance those excesses by new corruptions of judicial authority. But should the conflict be once more revived, I trust, that the freedom of our constitution will again triumph; and should that contest ever again occur, and another victory be gained over the pretended prerogatives of the crown, which events from the course of nature can scarce happen in my time, be it recorded in the journals of this parliament, for the instruction of our latest posterity, that such a time, whenever it shall come, will not be the era of a free government newly established in resistance of the abuses of royal power; but will be the era of mere salvation of a frame of government so ancient, that authentic memorials are wanting to trace its origin with any thing like accuracy.”—In the speech imagined for lord Coke, when he presented the petition of rights to the house of commons in the year 1627, there is a succession of thoughts, which are the result of all the now editor’s study of the ancient contests between the crown and the subject, on the claims of prerogative to a right of taxation and other powers of a legislative kind. The same ideas in substance have often occurred to his mind, and he has wished to disburthen it by an avowal of them; though till the present moment has not so much as once made the attempt. True it is, that these thoughts are very general, are mere outlines for argument. To try their force, an investigation of innumerable authorities is requisite. He is not now prepared for so extended an inquiry; nor if he was, would it be either proper or practicable to introduce it in preface to a collection like the present one. But loose and general as the reasoning is, it may perhaps serve as a preliminary memento for those, who are curious and able to pursue the subject in its fullest compass.

With respect to the particular claim of a prerogative to tax at the ports, it was more than liable to the general objections of being a prerogative taxation; because there was the addition of peculiar arguments against yielding to such a precedent. This was very species of regal impositions, which gave occasion to some of the ancient statutes declaratory of the illegality of taxing without the consent of parliament; as will appear by reading the incomparable speeches against impositions at

most authentic proofs, that it did not change, but merely renovate, or rather declare the constitution.

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the ports, by those profound constitutional lawyers Yelverton and Hakewill. It was also an apparent bar to such a claim, that it had not only been condemned in the reign of the first and third Edwards; but that from the time of the latter king, there had been a continual habit of granting duties of tonnage and poundage at the ports on the commencement of every reign, either for the life of the new monarch, or for a term of years. Nor is it to be forgotten, that prerogative impositions at the ports appear to have been dormant, from the reign of Edward the third, till after the accession of queen Mary, the elder daughter of our eighth Henry. That practice indeed did cause a resurrection of such impositions, after their having been asleep for near three centuries, by ordering some duties on cloth to be levied beyond what was warranted by the parliamentary grant of tonnage and poundage to her. But the then merchants of London were equally awakened by the measure; and they loudly complained, in the first year of Elizabeth, to that great queen, to be relieved on the ground, that such impost by mere power of the crown was illegal. Their opposition is thus stated in lord Dyer's reports: and it was aided by an argument against prerogative duties at the ports; for Mr. Hakewill tells us, that Mr. Plowden, one of the most consummate lawyers we have had at any time, composed such an argument against the duties thus irregularly imposed by Mary. From the same authority also, and from the account of the case in lord Dyer's reports fol. 165, it is clear that notwithstanding a conference of the judges on the occasion, no sanction, either judicial or extrajudicial, was ever obtained, in the reign of Elizabeth, for the excess of prerogative; or at least that it was never thought fit to produce any opinion of the judges, or to assert that any such was ever given by them in that reign.

Upon this transient view of the attempts to establish a prerogative power of taxation, how can it be wondered at, that the rash attempts of James the first and his son the unfortunate Charles, which latter really was possessed of many pleasing and valuable accomplishments, should terminate in the disgrace of the former, and the personal destruction of the latter? The father had to answer for attempting to systemize prerogative taxation. The son, misled by the father's ill example, and having had instilled into his mind the most extravagant notions of the unbounded extent of regal power, not only adopted his father's illegal plan; but persisted in it even after giving the royal assent to laws expressly condemning both generally and particularly all taxes of the subject except by act of parliament; and so at length the more deserving son fell himself a victim to the adoption of a system which the far less deserving father had begun to execute, with no other mischiefs than one which his mind probably did not sufficiently feel, namely, the disgrace of being odious to and distrusted by his subjects. To the conduct of their predecessors queen Mary, it was an objection, that she had revived an ill precedent of prerogative taxation after a dormancy of centuries. But on the part of James and Charles there seems to have been the aggravation of variously extending the bad precedent thus received from Mary; with the still higher aggravation of influencing the judges into a public avowal of judicial opinions, which justified even the principle of taxing without parliament. It may not be useless to add to this long note, that the present editor is in possession of a volume, formerly belonging to sir Christopher Yelverton, father to sir Henry Yelverton; which contains, among other valuable law manuscripts, not only a full report of the arguments of the judges and counsel in the Case of Impositions, but also the copy of a most elaborate argument in the Case by lord chief baron Fleming, from original notes written in his book, and in his own hand. Decided as the present editor is on this sort of subject, he will not to conceal an iota of the learning on the contrary side of the question. So far from it is he, that should the present undertaking be continued, which however is not very probable, it is his design to publish the very argument thus mentioned. Nor is he afraid to apprise his readers in the mean time, that, notwithstanding the great blemishes, it is so able a performance, as in many respects to deserve a very

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I shall now take some notice of two subjects, which fall within the compass of lord Hale's observations in the treatise now under consideration; one being IRELAND; the other being the *king's power of opening and shutting the ports*, and consequently including the doctrine of EMBARGOES.

With respect to IRELAND, it is introduced by lord Hale in this manner. In chapter six of the third part of the treatise, he is very full in explaining the original of the great custom of wools woofsels and leather. In Dyer's reports fol. 165. this great custom is represented to be due by *prescription*; and certain it is, that in the first stage of the great case of IMPOSITIONS, on which I have already been so explanatory, the advocates for the crown appear to have laid considerable stress on the want of a statute to prove the commencement of the great custom by *grant of parliament*; though, in respect of our want of parliamentary records previously to the reign of Edward the first, the argument from such a deficiency was in my mind feeble and inconclusive. But afterwards on a search of the records for the information of the house of commons in

1610,

serious attention, even from those the most hostile to the unconstitutional system of taxing without a parliamentary grant. There remains to add to this tedious note, that besides the books and authorities referred to in the editor's note to the *Case of Impositions* in the eleventh volume of the State Trials, our readers, who are curious on subjects of the constitution, may consult what he has remarked about benevolences in a note to mr. Oliver St. John's case, which happened in 1615, and is in the same volume.—The editor cannot conclude this note without apprizing his readers, that he is possessed of an imperfect manuscript tract, intitled, "Reflections by the Lord Chief Justice Hale on Mr. Hobbs's Dialogue of the Law;" and that this performance, though an unfinished one, contains both a very pointed refutation and a very severe reprehension of mr. Hobbs for his arbitrary notions concerning the extent of the king's prerogatives. In general lord Hale is the most dispassionate of all writers upon our law and constitution. But he saw the pernicious tendency of mr. Hobbs's doctrine in so strong a point of view, that in this instance lord Hale appears to have been scarce able to restrain his indignation. The following extract from the manuscript, being on *taxation*, will evince this; and at the same time shew, how pure this exemplary judge's opinions were on that high subject.

"It is a thing most certain and unquestionable, by the law of England, no common aid or tax can be imposed upon the subjects, without consent in parliament; and no dispensation or *non obstante* can avail to make it good or effectual; no not for the maintaining of a military force, though in case of necessity. And that man, that will teach, that in all these cases a tacit condition is implied, to let loose laws of this importance, and to subject the estates and properties of the subjects to arbitrary impositions, notwithstanding the solemnest engagements to the contrary.—1. Takes upon him to be wiser than the king himself, who hath not only granted, but judged the contrary.—2. Takes upon him to be wiser than all the estates of the kingdom, as neither just or prudent advisers for the good and safety of the kingdom.—3. Goes about to break down the security of all men's properties and estates.—4. Doth mischievously insinuate jealousies in the minds of men, as if all the laws of the kingdom might be abrogated, when the king pleaseth; and thereby does the king and his government more mischief than he can ever recompence."

1610, when the judgment of the exchequer for the crown was under consideration, a record of the 3. Ed. I. was discovered; which begins with calling the great custom by the name of the *NEW custom*; and after stating it to have been granted *par tous les graunz del realme, par la priere des communes des marchaunts de tout Engleterre*, gives, if not the tenor, at least the effect of the statute. This antient instance of a grant of duties to the crown by parliament, lord Hale anxiously presents to the reader *verbatim* from one of the two records of Ed. I. amongst which it is preserved. It being also on account of its great antiquity a precedent of the first authority in favour of a parliamentary taxation of the ports, his lordship makes various comments upon it. His eighth observation, being on the *extent* of the custom thus granted by the *English* parliament, is in the words following. "It was not only to England and
 "Wales, but also to *Ireland*; and by *virtue of this act of the parliament of England, the kingdom of Ireland was charged with this custom*; and it is under that right the king holds these customs in Ireland, and *holds them to this day*. It is true, shortly after this grant the king did remit it for some time in Ireland, and made an abatement for the same to the merchants of Florence that farmed it. Claus. 7. E. 1. m. 5. But it was soon resumed, and continued under this, and *no other title, for any thing I have yet seen or read*."
 There was a time, when I should have been disposed to have made considerable use of this extract from lord Hale's work: but that time is now past, and as I conceive never can come again. The fact is, that some years ago it was foreseen by myself as well as innumerable other persons, that our unfortunate contest with America about taxation would soon awaken enquiries into the grounds of our claim of subordination from Ireland, and so rekindle an old controversy on that subject. Having this probability in my mind, I became curious to investigate the subject, and to consider the principal arguments on each side. The result was favourable to the English side of the question: though I am far from supposing that this might not be owing to prejudices, such as may be expected to operate naturally, insensibly, and forcibly, upon the mind of a person born in England. When I had nearly convinced myself, that the weight of argument greatly preponderated for us, I proceeded to plan a sort of history of the controversy in all its stages, including what passed when the English declaratory act was made in the reign of George the first: and I actually executed a rough sketch of this part of the design, which I still have in my possession. But this was

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a small part of the object I had in view, and mere introduction. The main part of the design was to have exhibited the foundations of the claims of England; and to have done this without resorting to any such harsh and provoking language, as I have read or known to be sometimes advanced in the support of our pretensions. I meant to have arranged my proofs of a subordination, under the three great divisions of power *executive*, power *legislative*, and power *judicial*. On the first of these heads I should have particularly considered, how the connection of our kings grew with Ireland: and how the government there was founded on a colony from England; which having been begun in the reign of Henry the second, and being at first restricted within narrow limits, gradually increased, till what was called the *English pale* spread over the whole island; by the final completion of which enlargement, after violent struggles and various revolutions; the Englishry and Irishry, in the reign of our James the first, became consolidated into one people, and quite associated under one government. Here also it would have been a great stress of the argument with me, that Ireland, by her own confession, and by the constitution as laid in the first plantation of the colony there, and at last finally assented to by herself, takes her *executive* power from England in perpetuity; that is, agrees to accept for her king whoever for the time being shall be king of England. On the second head I should have assembled all the instances of an exercise of legislative power by England over Ireland, by arranging them under various heads; and I should have inferred much from those English statutes, under which many protestants in Ireland are understood to hold their lands against the antient Irish Roman Catholic proprietors, for the sake of shewing, that at least the former could not consistently deny the force of English statutes in Ireland. With respect to the third head, I should have endeavoured to have proved a subordinate judicature in Ireland from the infancy of the English colony there; and more particularly, that an appellant jurisdiction over Ireland by writ of error had been uniformly exercised *immediately* in the king's bench of England, and *finally* in the English parliament, as far back at least as the reign of Edward the first. In respect also to the late commencement of English appellant jurisdiction, as exercised by the English house of lords over Ireland in equity causes, I should have explained, that it was to be accounted for in a great measure, from the late adjustment of the appellant jurisdiction from our own courts having original jurisdiction in equity; it being well known, that the appellant jurisdiction of our house of lords was questioned

by

by an English house of commons, as lately as the reign of queen Anne. Having thus gone through the *matter of fact* as to the political connection binding England and Ireland together, I should then have proceeded to shew, that the subordination contended for had as fair a foundation as the most admired governments in general have: namely, that however force and oppression might anciently have operated; yet finally the subordination of Ireland to England in a certain qualified way, was sanctioned by the consent of those over whom it is claimed; what passed between the two islands amounting impliedly to a sort of contract between them, that the subordination of Ireland should be taken by England as the price for such an entire communication of its government laws and liberties, as should consolidate the inhabitants of the two islands into one nation. Therefore I should have insisted, that rightly understood there was nothing insolent in the claim over Ireland as a subordinate kingdom, nothing degrading, nothing which causes the least individual inferiority as between the natives of the two islands; but on the contrary, that the inhabitants of both were personally equal in privileges, equal in liberties, equal in capacities to hold offices and estates, equal in every thing. Having brought the subject into this favorable point of view, and thus attempted to obviate all invidious distinctions, I proposed to have concluded with stating certain inconveniences and embarrassments, which might arise to both countries, if any of the three great links by which I then considered England and Ireland as politically united, should be broken; that is, if Ireland should insist on independency in respect either of the executive magistrate, its legislature, or its judicature. Such was the project with which I once pleased myself, for the sake of continuing what I then was inclined to think the true and proper lines of political connection between England and Ireland. But that project is now at an end; and I chiefly state that it once existed, in order to express, how my mind feels the adjustment which has been recently made. Ireland is now possessed of a legislature independent of the British parliament, and exercises appellat jurisdiction for itself with equal independence. She claimed a right to these independentencies; and statutes have been passed in Great Britain, which in substance acknowledge the right of Ireland to both. These claims by Ireland then, with these acknowledgements by Great Britain, amount in my construction to a solemn renunciation by the British parliament of all pretensions either to legislate for Ireland, or to exercise judicial power over it in any degree or form; a renunciation without so much as one exception.

See 22.
G. 3. ch.
53. 1723.
G. 3. ch.
20. 1724.
1724.

G. 3. just before commencement
of union 1706.

exception. From the moment therefore, that the British declaratory act of the reign of George the first was repealed, and that Ireland prevailed in obtaining from the parliament of Great Britain a renunciation so ample and unambiguous; all pretence for further controversy on points so solemnly and finally decided ceased to exist; and so seeing the important transaction between the two islands, I thought it a duty incumbent upon me to desist from further investigation, or stirring points thus finally compromised by the proper authority. Whether Ireland was once connected with Great Britain by the three grand political links or not, certain it is, that only one great link now subsists to keep the two islands together; I mean the link from their having one common sovereign. The two other links of the chain, those from Great Britain's claims of legislative superiority and of appellat jurisdiction, under whatever title they may have been heretofore possessed by her, are now so absolutely perished and gone, that they can never be revived, unless Ireland shall voluntarily desire it, without breach of faith in Great Britain, and consequently without national dishonour. Two of the three great links being thus dissolved, let us from henceforth supply their place, by giving new strength to links of another kind: I mean the links of reciprocal kindness between the two nations. Let the stern claim of empire be succeeded by a strong and independent friendship. Though Great Britain might heretofore have looked down on Ireland, as the aged parent looks on the tender child; Ireland having now attained the age of ripeness, and being thus emancipated from all parental authority, let her henceforward be received by Great Britain as a younger sister only. On the other hand, though Great Britain has now no longer the least claim to a parent's authority over Ireland, let the latter island exert its natural and characteristic generosity of mind, by in future evincing, that the ties of a sincere family affection have more real and more permanent force, than the strongest chains ever forged by the rigid hand of power. Some embarrassing situations will most probably arise from the late adjustment of the political relation between England and Ireland: for how is it possible, that two such great lines of national constitution, as a declared and partly exercised subordination of legislature, and a long and at last fully-exercised subordination of judicature, should be extirpated, without some temporary disorders, some occasional difficulties? The collective and political body in some points of view may be well resembled to the individual and natural one. In both there is an infinitude of parts, by the conjunction and connection of which the whole and entire body is formed; and

and such conjunction and connection are more particularly obvious and essential between the great leading substances and the numberless small inferior branches; which latter, being dependent in their nature, must be affected with, at least temporary disorders and obstructions, as often as the former experience an essentially new arrangement, however tending to improvement. But in both cases, it appears more safe and prudent to wait patiently for the succession of incidental diseases, and to combat them singly as they arise, than at once to form too vast an enterprize, by immediately attempting to find out and apply one general remedy for their entire prevention. New political settlements will ever be accompanied with jealousy in those, who by their vigour of conduct obtain concessions; and with a proportionable sense of pain in those, whose fault or misfortune it is to have given occasion to insisting upon them. Much time, joined with much experience of a mutually faithful adherence to the new stipulations (such as evinces, that there is not any latent design on the part of those gaining the concession to make still further claims; nor any latent insincerity on the part of those from whom the concession moved, any latent design to revoke it) must be assuredly requisite, before the jealousy of the former can subside or the pain of the latter be subdued. Nor whilst these nice feelings are in full force, can it be otherwise than doubtful, whether it may not be in some degree premature to propose new extensive engagements of any sort between two countries, under influences and prejudices operating against a dispassionate and impartial consideration; by which only it seems possible to fix upon any further great arrangement for the benefit of both, without making an undue sacrifice of the interests of one of them. It deserves also to be considered, whether the consequence of too early an attempt in this way, however persuasive the temptations to it, may not be, not merely a failure for the present; but an entire disappointment of all hope of accomplishing the intended good in future; or at least a far longer postponement of it than would probably happen, should it be resolved to wait for the most favourable opportunity of adopting such an enterprize. General as these remarks in respect to England and Ireland are, they will not, it is hoped, either be lost upon or offend the cool penetrating and experienced reader. They are not pointed at any particular party or class in the state. Nor should they be applied to any arrangement past or to come. They are really intended with the generality in which they are expressed; being most sincerely offered for

the equal and common use of all descriptions of persons in both islands. Throughout this short consideration of a very large subject, I have endeavoured to banish from my mind all corruptives of judgment whatever. Indeed I most strongly feel, that on the interesting subject thus observed upon, there is a great stake depending, no less than—whether two sister islands shall continue to constitute one great and solid empire:—or, whether they shall become divided in affection and interests, and so both fall a prey to the envious surrounding nations; which are anxious spectators of every political transaction between the two countries, in order to find the means of aggrandizing themselves at the expence of our humiliation. With such a serious alternative impressed upon his mind, a man must be the veriest of all slaves to his passions and his interests, who on such a national connected with the new of political or of personal partialities, or of any other considerations besides those of publick good.

I now reach the important subject of the prerogative in respect to the *opening and shutting ports and EMBARGOES*. The reader will find this great head of prerogative treated in chapters 8 and 9 of the second part of the treatise still under consideration. Indeed the first of these is not immediately applicable to the ports, being on the power of the crown to restrain persons from going out and from coming into the realm. But this power as to the *person*, whether at the ports or elsewhere, and the power as to *merchandize* by opening and shutting the ports, are kindred prerogatives; and as such lord Hale connects them, by first treating of the former, and immediately proceeding to explain the latter. On both he is so copious, that I doubt, whether the two chapters, I thus refer to, do not contain much more real matter, than all we have already in print being put together would amount to. However, full as these two chapters are, they are not the whole of his lordship's collections on the two prerogatives in question; as appears to me from an examination I heretofore made of one of his manuscript volumes on the rights and prerogatives of the crown in general: and as I presume, that most lawyers will be anxious to see every line written by so very consummate and upright a judge on a subject so material, I have given an extract of this part of the work last-mentioned

mentioned in a note below *, which I am enabled to do by the favour of the present possessor of the original manuscript. Formerly I had myself made some collecti-

* What follows is an extract from a volume of Lord Hale's collection concerning the *Jura Corona*. It was copied by me from the original in lord Hale's own hand-writing, in the presence of the worthy possessor of the manuscript, and as I understood at the time with liberty to make such use of it as I should think fit. I have endeavoured to preserve the spelling throughout.

" In the next place wee come to the kinge's power in OPENINGE and SHUTTINGE the ports.

" Touching the SHUTTINGE of the ports.

" I. By restraining of persons to passe the seas.

Claus. 41.

E. 3. m. 25.

dorso B. 13.

" By the statute of magna carta cap. 30. omnes mercatores, nisi publici antea prohibiti fuerint, habeant saluum et securum conductum exire et redire, &c. But fuller in the charter of kinge John, where after the said act, licet de cetero unicuique de regno nostro exire et redire salvo et securi per terram & per aquam, salvo fide nostra, in tempore guerre vel per aliquod breve tempus propter communem utilitatem exceptis imprisonatis et utlegatis secundum legem terra, et gente contra nos guerrina, et mercatoribus, de quibus fiat sicut predictum est.

" By which and by many other authorities it appeares, that at lest till prohibition every man may without any licence passe the seas. And thus the law continued untill the stat. of 5. R. 2. c. 2. which now stands repealed by the st. of 4. Ja. Yet it likewise appeares, that the kinge may by his prohibition restraine the passage of any person; and the restrains were of two kindes.

" 1. The particular restraint by the writt de securitate inveniendū exeat regnum. Vid. F. N. B. 85. This is cleare, and as cleare likewise, that the kinge may by his writt under the greater or private seale command the return of any subject beyond the sea. Vide for the and the paine of disobeying it st. 13. Eliz. cap. 3. Dy. 12 and 17. 375.

" 2. The general restrainte. And this is clerely that intended by the stat. of magna carta, nisi publici antea prohibiti fuerint (not as if must bee a prohibition by act of parliament); and this appeares by constant practice especially in time of danger, when a free passage might either weaken the strength or disclose the secrets of the realm. Vid. claus. 11. H. 3. m. 25. dors. 10. H. 3. 27. dors. 2. E. 3. m. dors. 3. E. 3. m. 36. dors. and infinite others. And this prohibition the kinge may take off generally or particularly as he pleaseth.

Dy. 29. b.

Claus. 46. E.

3. m. 19.

dors. b. 119.

m. 35. dors.

B. 126.

18. E. 3.

cap. 3.

" II. Touching the prohibitions of exportations and importations commodities.

" It is true, that by divers graunts in parliaments the sea ought to be open for exportation and importation of merchandize. Rot. Parl. E. 3. n. 17. 22. E. 3. n. 8. Item que passage de leines et d'autres marchandises soient ouverts sans faire apresles ouster la custome a les marchants, que ont les custumes du Roi par un certain, quel apresle t-

ns concerning embargoes. But they are principally
extracts from reports and books, which are in every
lawyer's

*al profit des dits merchaunts et outrageuse grevance & nuscance a votre
commun. RESY. Soit le passage ouvert, et que chescun poit passer fraunchement,
s'avant au Roi ce que lui est due.* Yet clerely the kinges of this
realme always exercised a power in restraint of the free passage of some
commodities of this realme by their own power, as well before as after
12. E. 3. And though complaints were made of it, yet the crown re-
tained the power. *Vid.* 25. E. 3. n. 22. 1. H. 5. n. 41.

" Some instances of the particulars.

" (1.) For exportation prohibited.

" 1. The kinges have usually before the stat. of 1. & 2. P. & M. cap.
4. & 13. Eliz. cap. 15. prohibited the exportation of corne and graine;
because the necessary sustenance of the realme. And this is in effect
admitted legal, Rot. Parl. 17. R. 2. n. 39. Upon a petition for the re-
peal of such a restraint, the answer was, *Le Roi le voet a present, pro-
visé que bien lise a son conseil a restrainer le passage quant il semble be-
soignable.* For such restraints, *vide* clauf. 5. E. 3. parte 1. m. 21.
dors. Rot. Parl. 50. E. 3. n. 156.

Vid. clauf.
41. E. 3. m. 21.
dors. B. 15.
Clauf. 48.
E. 3. m. 11.
dors. B. 159.
Clauf. 46.
E. 3. m. 21.
dors. B. 118.
Clauf. 47.
E. 3. m. 12.
dors. B. 127.

" 2. The kinges of this realme have usually prohibited the exportation
of coigne and bullion before any act to restrain it, because it is the riches
and wealth of the realme. Clauf. 30. H. 3. m. 11.

" 3. The kinges of this realme have usually prohibited the exportation
of armes, or such other thinges as are for the necessary defence or
strength of the realme. *Vide* clauf. 10. E. 3. m. 31. dors. a proclama-
tion inhibiting the exportation of boards or timber for ships. Clauf. 38.
E. 3. m. 29. a prohibition of exportation of horses, falchons, thread,
bowes, arrowes, bow-strings, and arms, and to arrest the ship and
goods. The like prohibitions of commerce with enemies.

Of woolls
and wool-
fels,
49. E. 3. m.
21. dors.
B. 170.
Clauf. 43.
E. 3. m. 3.
dors. B. 50.

" 4. The kinges have usually restrained the passage of custmable
goods to some particular ports for the better preventinge of defrauding
of customes, and at these ports the cockets kept. Thus did E. 3.
Clauf. 5. E. 3. parte 1. m. 12. dors.

Now settled
by the act of
1. Eliz. cap.
11.

" And in these cases prohibitions of this nature were legall, and for the
most part the coercion was by stay of the ship or goods prohibited; for
no proclamation could induce a forfeiture; and for that cause most of
these thinges were provided for by act of parliament, which subjected
the party to a forfeiture or other penalty.

Vid. the pe-
nalty for
breaking
such an ar-
rest,
Clauf. 46.
E. 3. m. 28.
B. 110.

" (2.) Now for an instance of a restraint of foren trade or importation.
—Upon this the acts of magna carta, cap. 30. 9. E. 3. cap. 1. 25. E. 3.
ft. 4. cap. 2. 2. R. 2. cap. 1. lye heavy; and it hath been seldom prac-
tised. *Vide* a restraint of foren trade in Ireland, 3. R. 2. n. 44.

" Thus much for the kinge's power of shutting the ports; which,
though it was sometymes useful and profitable for the kingdom, yet of-
tentymes was made a meanes of great damage and oppression, which
did arise by lettunge loose the restraint to particular men for profit.

" And so ariseth the next consideration of the kinge's power of
OPENING the ports.

" The kinge might open the passage, which either by his own procla-
mation he had restrained, or which by act of parliament were restrained,

Vid. Clauf.
46. E. 3. m.
22. dors.
B. 118.

lawyer's reach; and since having seen lord Hale's superior collections, I am become too much out of conceit with my own to give them in print. Nor shall I, at least on the present occasion, venture to dwell very much on a subject, which, from lord Hale's cautious and doubtful manner of handling it, I perceive to have been considered by him, as having far more both of difficulty and delicacy, than heretofore occurred to my mind. It is also an additional reason with me for being now more reserved, that I observe in one part of sir Henry Yelverton's argument in the CASE of IMPOSITIONS some weighty considerations on the nature of the king's prerogative at the ports, which of themselves are enough to cause a very serious deliberation before risking any remark on such a subject. There is however one point, on which I already stand in some degree committed, by my preface to the eleventh volume of the State Trials, where my aim was to question the propriety of restricting the prerogative of laying embargoes, whatever may be its nature or extent in other respects, to the *single emergency of actual war*. Even on this point, when I first read lord Hale's collections, I thought myself in danger. But, fortunately for me, I find, that so far as relates to the distinction between *actual war* and *other public calamity*, against which my remarks were apparently directed, there is enough in his lordship's view of the subject to countenance my manner of observing upon it in the preface before cited. And here notwithstanding my present confession of the necessity of great reserve on such high topics, I cannot refrain from remarking a little on the turn of a very famous parliamentary debate in the present reign on the law of *embargoes*. The subject of it arose thus. In the autumn of the year 1766 an alarming distress was caused by the scarcity of wheat, and there was an apparent danger of the want of a sufficiency to supply the consumption of the country: under which pressure the crown by advice of the privy council issued a proclamation for an embargo on all wheat and flour going out of the kingdom, until the

"either in respect of this or that particular commodity; as when exportation of some particular wares were restrained in respect of the place, as the transportation of wools to the staple. This is cleere and without question, whereof before. These licences were also complained of, and often enacted against, but could never be remedied. *Vid.* 21. R. 2. n. 82. and the procurers of such licences punished. 51. E. 3. n. 17. *Vid.* 27. H. 6. n. 29. 9. H. 6. n. 37."

advice of parliament could be taken. Soon after the parliament was assembled; and then this embargo, though confessed to be an expedient measure, was treated by some great leaders in both houses as an adventurous breach of the statute of 15. Cha. 2. c. 7. which permits the exportation of corn and grain when under a specified price. This seeming reproach caused warm debates in both houses. In the upper house, two lords then high in administration, who were not less distinguished for their ardent love of liberty than for the most splendid and captivating oratory, took fire at the imputation of having acted illegally; and in the warmth of the moment for once in their lives uttered words thought to be unfriendly to the constitution of their country; their defence of the measure having been construed, to attribute to the crown a power of dispensing with and suspending acts of parliament in such a case of extreme emergency as imminent danger of famine. Off their guard, those truly great men could not have been on a more tender subject of law; and even though there had been no political enmity to sharpen the provocation, the mere semblance of a dispensing doctrine was enough to cause alarm. Accordingly, the moment they were supposed to be sufficiently committed, a torrent of rival eloquence burst forth from a law-lord still in office; who levelled his choicest thunder against the justly odious and condemned prerogative of suspending laws, and so seemed to set at defiance those united powers, which on some former occasions he had not shewn himself solicitous to combat with singly. In the lower house the debate is represented to have taken a still more vehement course; for here an ancient member, who had for years professed zeal for our laws and liberties, is stated to have asserted broadly, that "whenever the public is in danger, the king has a dispensing power;" which gave such strong offence to the house, that he found no small difficulty in delivering himself from serious consequences by repeated explanations of his original words. The result of the whole was passing an act of indemnity, as well for those who advised the embargo, as for those who executed it; and in this act it was recited, "that the embargo could not be justified by law." After frequently reflecting upon this transaction, the first day's debate upon which in the house of lords I myself heard, it occurred to me long ago, that there may be some reason to doubt, whether the supposition, that this famous embargo was

was clearly indefensible on every other ground, as well as on the hateful and unconstitutional ground of a suspending prerogative in the crown, is really well founded. To express more than a doubt on a point taken *pro confesso* by the legislature, would be indecent in a private individual of any description. But under the peculiar circumstances, to which I impute the condemnation of the measure as illegal, it may perhaps be excusable even in me, if, for the sake of other important cases which may in future arise, and to prevent prejudice to the general question on the crown's power of laying embargoes in time of war, time of famine, and other such great public emergencies, I risk a few observations upon the turn of the debate before stated. I do most heartily agree, that the embargo was not defensible on the ground of a suspending power in the crown; and that a doctrine of such a tendency, though it should come from the greatest ornament and friend the country ever had, ought to be instantly and strongly resisted. But is it certain, that there was no other resource of argument, wherewith to have saved the embargo of 1766 from parliamentary condemnation? Is it perfectly clear, that the statute of Charles the second intended more than to remove certain prohibitions or impediments, which then made or were supposed to make the exportation of corn unlawful? Without going into a long and intricate investigation on the previous state of our law relative to the exportation of corn, is not the language of the statute itself an implication, that at least there was prevalent a notion of some existing prohibition against exporting corn; the liberty to export being given, with the addition of these words, *any LAW STATUTE or USAGE to THE CONTRARY notwithstanding*? Is it undoubted law, that, because a commodity is *in general* exportable, therefore it cannot be touched *for a time* by an embargo? Had this last question been put to the noble law-lord, whose eloquence was the chief cause of procuring a condemnation of the embargo of 1766, would he still have answered that it was illegal? If he would so have answered, would it have been because he thought, that there is no power in the crown to lay embargoes without the special authority of an act of parliament; or because he conceived that such a prerogative notwithstanding the possibility of gross abuse of it, really existed, but that it was only exerciseable in times of *actual war* or because though it might be exerciseable in time of danger of *famine* or of any other great public calamity, yet

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could not be exercised on any *single* commodity, but must be *general* and reach to *all* merchandizes whatever? Lastly, how would the noble lord alluded to have answered, if he had been asked, whether a statute, made to legalize a prohibited exportation or one supposed to be prohibited, ought to be considered as made to alter in effect the law of embargoes; and if not, whether an embargo, otherwise legal, became illegal, merely on account of such a statute made *diversa intuitu*? These questions are proposed as the most decent manner of opening the course of my mind on the famous subject of the embargo of 1766; and of shewing, that the doctrine of dispensing with and suspending laws was as foreign to the real general question, which was then to be decided upon, as it ever is alarming. But though I have certainly marked the process, by which I conceive the law of the case ought to have been explored; I must protest against having it understood, that my sentiments are made to on all the points thus started. It is far otherwise; more especially since reading lord Hale's collections on the subject of embargoes. What I wish upon the whole to convey to the reader is, that, if the declaration, of the illegality of the embargo of 1766, is considered as a declaration against its being indefensible on the principle of a dispensing or suspending prerogative, it cannot be too much applauded: but that the declaration, as in strictness from its unqualified generality is the literal construction, shall be taken as a condemnation of the embargo on every other possible ground, it is to be lamented, that those other considerations, I have suggested, had not been made the serious topicks of dispassionate debate. Nor can I conceal, that, so far as my weak judgment of the matter goes, the doctrine of embargoes, which before was too much involved in doubts and difficulties, is now left with such new accumulation of embarrassment, as require a speedy adjustment of the law on this power of the crown, by a short statute, not only fixing its extent with certainty, but to the utmost guarding its exercise against all possible abuse. It is very easy to say, that an illegal embargo may in a great and apparent extremity be resorted to; and that afterwards parliament will sanctify the deed by a statute of indemnity. But, besides the danger of familiarizing ourselves to the exercise of illegal powers by the crown, it may not be doubted, whether, when it is once become current,

current, that an embargo is illegal, there is not a probability of its being resisted; and if resisted, whether very fatal consequences might not happen to those employed to enforce it? Thus having exhausted all I have at present to advance on the law of embargoes, I shall now take my leave of it by apprizing the reader, that there is existing in the hands of others as well as of myself a most copious and learned dissertation in favour of the legality of embargoes. It was composed in January 1778, and was given in the form of an opinion on a then recent Irish embargo, by a king's serjeant at law; whose profoundness and extent of legal knowledge would entitle him to be classed on the same form with the famous mr. Plowden, if that great lawyer had been born to shine a living ornament of the present times.

II.

The second tract in the volume is on a subject, to which lord Hale appears to have frequently directed his attention. For besides this unfinished piece on the amendment of our law, I have another fragment of his composition on the same subject, being one of the manuscripts of which mr. Jekyll's kind present to me consisted; and there are also some thoughts tending to a like point, intermixed in lord Hale's excellent preface to serjeant Rolle's Abridgment, of which his lordship was the editor.—In the treatise now presented to the public, there will be found a great variety of things to recommend it.—In the general consideration of alteration of law the reflections made by lord Hale almost exhaust the subject for so deeply he appears to have thought upon it, that scarce a caution against being either too yielding to alteration or too averse to it can be stated, which he has suggested. It is to be lamented, that when he reaches the particular subject of our own laws, he was not equally copious; and that he did not find opportunity of completing this part of his design. However the subjects he has touched upon are interesting. Two of them are now particularly so, as like topics have for some time past been, and are established under parliamentary consideration. I mean the subjects of *reforms of office*, and the *crown lands*.—With respect to the former, the commissioners of public accounts, to whom the

probably hafterly labors the nation is fo much indebted, will not have very far reafon to be difpleafed ; becaufe they will find, that they are to enforce actually anticipated in fome of their ideas of official reform, to advance with fcarce a poffibility of their knowing it. Thofe, who leave of it friend the fale of the crown lands will not be equally flattered ; for it is clear, that his policy was to nurfe and improve the landed eftates of the crown, not to difpoffefs the crown. It was of them ; though in his time they were of far greater value and extent than they now are. His mind might be ftrongly king's feff imprefsed with the clofe connection between the king and his gal know subjects, through the medium of *tenures* ; and thence perhaps form with ad imbibed an invincible prejudice againft any meafure tending to annihilate for a time what originally was the chief prop of the monarchy. Perhaps though no judge feems to have ever mixed with his loyalty to the crown more jealousy of its affecting independence of parliament, he might have ftartled at a policy, which, if accomplifhed, might produce a phenomenon in a monarchy of feudal extraction :—a king of Great Britain beginning his reign without an acre of land for his ent of of patrimony ; nay with fcarce any other pittance to fubfift upon n the fmall parliament fhould be affembled to relieve his diftrefs. Mr. Jekyll perhaps though lord Hale might have thought, that it cerme though ainly would endanger the conftitution of parliament, if the's excellen hereditary eftates of the crown fhould become ample enough his lordfhip enable the king to carry on the government for any length to the full time without parliamentary aids ; yet on the other hand he to recon might have revolted at the idea of feeing the crown fo deon of law radingly impoverifhed, as not to be able either to difcharge the fubjects public functions, or to difcharge its private expenditure on it, th for one moment, without asking a boon from the two houfes to alter parliament. Lord Hale had been the fpectator of a revolution, which for a time had overturned the monarchy ; and he has foon, which for a time had overturned the monarchy ; and reaches well knew, that, notwithstanding the brilliancy of its reftror equally on, there ftill fubfifted a ftrong fpirit of enmity to the crown, completing a lying wait to undermine it. In his time, therefore, he has toucht might have caufe to fear, that even momentarily feparating particular from the crown the whole of its landed patrimony might en, and the eftablifhing a moft dangerous precedent, for gradually the fubjects difolving that variety of connections between the crown and h refpect people, in the maintenance of which in due vigor the ad, to wherency of the monarchical part of our government to its mafter ther conftituent parts muft depend. All this one might eafily fuppofe

suppose to have influenced the mind of lord Hale, when he was writing the chapter on the inconveniences in the management of the king's revenue, one object of which is explained to be, that the hereditary revenues of the crown might not be impaired. If there was force in such reasoning in his time, there was still greater some years after, when queen Anne succeeded to a crown far more impoverished in landed possessions, than Charles the second. It is no wonder therefore, that on her accession a policy should be adopted by parliament, the professed object of which was not merely to preserve the small remainder of the royal patrimony, but to effectuate gradually such an increase of it, as might restore the diminished dignity of the crown without in the least endangering our free constitution. Hitherto that policy has operated with such surprising slowness, that the sum total of the clear produce from the land revenue of the crown, including Wales and the Duchies of Lancaster and Cornwall, is inferior to the clear income from the landed estates of some of the king's subjects. It must, however, be confessed, that a time may come, when this policy, with the increase from contingent accessions by escheat and forfeiture, may so have augmented the landed revenue of the crown as to render it formidable; more especially when it is considered, how great the revenue is, with which the crown must necessarily continue entrusted for keeping down the interest of the national debt. Whenever also that time shall come, it will be as convenient to remove the restraint of alienation, as in the reign of queen Anne it was to impose it. But till such a time shall approach, the subject may well deserve serious consideration before the policy of cherishing an increase of the landed estates of the crown shall be sacrificed to leaving the crown without any land revenues whatever, under an imagination, that the sale of such a trifle in point of produce in money will materially lessen the national debt. I remember, that, in a book by mr. Howell, on the precedency of kings, which was published soon after the Restoration, that industrious author amongst other pretensions of superiority attributed by him to the crown of England, makes high boast of its palaces, its forests, its chases, its parks, and its splendid domain of every possible description. This, I confess, favours much of rant and declamation. Yet I cannot think, that to stress on such royal appendages is wholly without foundation: for though having large crown possessions in land

not suffice to settle the point of precedency between rival kings ;
et I can conceive, that our king's having some landed pro-
perty may be essential to the preservation, both of his own
dignity, and of a due connection with his subjects. How-
ever, it would be unjust to leave this digression, without first
doing justice to him who is understood to have first suggested
the sale of the crown-lands in the present times. The propo-
sition was introduced with an eloquence, which would have
honoured even Athens or Rome. Nor is there room for sus-
picion, that this eloquence was exerted otherwise than with
perfect integrity of intention,

It is no more than might be expected from such active zeal
for public good as lord Hale's, that, notwithstanding the
unusual weight of his judicial and professional fatigues, and
the variety of studies to which he was addicted independently
of the law, he should be prompted to give some attention to
the reduction and improvement of the laws of his country, and
to encourage others in like undertakings. Long before his
time, lord Bacon had anxiously laboured to accomplish a work
of the same laudable kind, as appears by several of his printed
works : namely, his proposal for amendment of our law,
made to the crown whilst he was attorney-general ; his offer,
when under his disgrace and troubles, to assist in composing a
digest of our laws both common and statute ; and his remarks
on obscurity, accumulation, and new digests of law, in his
great work *DE AUGMENTIS SCIENTIARUM*. Thus even in
lord Bacon's time the evil from the obsolescence of various
rules in our common law, and the evil from the encreased
bulk of our statutes, were sufficient to strike his mind as a
serious one. After the Restoration both evils not only had
considerably encreased ; but from the great revolution as to
the law of real property, which then took place under the sta-
tute converting military tenures into socage, and from the
increasing frequency of new laws, were likely to be yearly
more aggravated. Lord Hale certainly took alarm at this
respect of growing inconveniences in a venerable and fine
structure, which from its antiquity was already encumbered
with too many useless apartments, and from the nature of our
constitution was particularly open to a superabundance of
new accessions. Hence therefore, notwithstanding his appa-
rent jealousy of the proneness to innovation, for which the
age

age in which he lived had proved itself almost characteristic; he convinced himself, that some remedy was become requisite, to reduce and simplify our system, as well by lopping of ancient redundancies, as by encouraging an orderly digest and a correct elucidation of all the remaining matter. The former purpose could not be attained without the sanction of the legislature. Nor could either be effectuated in the best manner, without an union of private labors in the extended vineyard of juridical learning under the fostering encouragement of royal patronage. For where was the single individual equal to so vast a design? where could have been found the many qualified by education study and talents for a joint execution, whose situation would allow them to make the necessary sacrifice of their time without a prospect of retribution from their country? or how could it be expected, that lawyers, such as the great Tribonian and his illustrious associates would desert all private pursuits and all professional emoluments for the sake of digesting national laws, without a Justinian to patronize their toils, and to reward them with some portion of distinction and independence? Lord Bacon's discernment apparently saw the matter in this light; for from the beginning he addressed king James, as if royal countenance was essential to the execution of such high plans: nor could lord Hale be ignorant, that in England such enterprizes wanted the patronage of an Edward the first to feed and cherish them. So far as single persons, so much detached from public employment and important studies and occupation of another kind, could well contribute by the combined exertions of genius and learning, was performed in a very considerable degree by Bacon, and in a very wonderful one by Hale. Pity it is, that, from their times down to the present moment, the body of our law has been suffered continually and rapidly to increase, with scarce any other aids to contract its bulk or preserve its consistency, than those of occasional private contribution. What would a Bacon or Hale have said; what would they have advised; had they lived to have seen our statute law not only swelled already into more than tenfold size beyond that which so alarmed their apprehensions, but still yearly extending its dimensions by such a ratio, as must soon terminate in a bulk immeasurable by the most industrious and accomplished of legal understandings? Would two such zealous friends to English jurisprudence, far exceeding even the Tribonian and Theophilus

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of the school of Roman law, have been mere spectators of the most dangerous of all juridical diseases? Would they not have generously offered their aid, towards forming a plan, for as gradually curing this disease of infinite accumulation, as it has been gradually and almost imperceptibly contracted? Would they not, were they now living, have earnestly supplicated the sovereign, or perhaps the parliament, to save the country from that ruin, which must ensue the moment the science of law and the administration of justice shall cease to be practicable?—These questions lead the mind into such a field of high national topics, that I fear at this time to continue the train of thoughts, which momentarily occur to me. To engage in such an enterprize, at any time, or under any circumstances, might be extreme rashness in one ill situated and sparingly endowed as I am. It is an ocean far too boisterous for a little shattered bark like mine; and therefore cannot be too soon quitted.

III.

The third article of the volume is a far more copious account of the office of master in chancery, than has ever been yet printed. It contains internal evidence, that it was written by a master in chancery, whose views it was to restore to his official situation what he conceived to be its antient rights and pre-eminences: and what gives a particular weight to his representations is, that throughout he chiefly derives his materials from public records.

Though only very few hours * remain for compleating this preface, I cannot forbear from here adding some observations concerning the important office of master, which strike me as properly arising from a perusal of the tract upon it.

It is well known, that masters in chancery are honoured with seats on the woofsacks in the house of lords; the origin of which distinction probably was their being companions of and assessors to the lord chancellor or lord keeper for the time being. Equally true is it, that they are in an almost dormant state in that noble assembly; being either the mere pageants of the day, or at the utmost only employed as servile instru-

* Though thus pressed in time, I cannot forbear acknowledging, that, without the condescending assiduity of my worthy young friend and pupil Charles Proby, Esquire, barrister at law, in staying by me as a voluntary amanuensis, a still further day of the present publication must have happened.

ments for carrying messages to the lower house. But from the tract in question it will appear, that antiently they were attendants on the lords for the honourable and important purpose of advising the lords on those branches of learning, which belong to their occupation in the sphere of jurisprudence: and considered in this point of view, they were properly placed near to the judges, who are called upon to assist the lords in a similar way. Here too the reader will be informed, how the silence, under which the masters have so long languished in the upper house of parliament, began. It seems, that a master in the reign of Elizabeth rashly and indecently opened his mouth, without waiting to be called upon by the lords. The immediate consequence was, not merely a reprimand to the offender, but a most lasting punishment to the whole order; for from the time of the offence thus committed, other law-attendants on the house were placed above them, and no one master has ever since been required to utter so much as one word. The cause of this long silence of about two centuries being thus made known, perhaps it may be at length thought that the offence, for which the penance was imposed, is now sufficiently atoned; and that for the sake of public utility this extraordinary mode of punishment should from henceforth cease, and the masters be again allowed to exercise the faculty of speech, with all the energy of their more antient predecessors in office.

Another discovery equally important arises from the treatise in question. It is undeniable, that, with the exception of very rare instances to the contrary, masters in chancery have very long been mere *nominal* assessors to the lord chancellor and master of the rolls on their respective judicial seats. When indeed a judge sits for the lord chancellor, it is under an authority in which two masters are joined; and then it is understood, that they are *co-judices*, and therefore have a right to offer their opinions. But so fixed in them is the habit of silence that, even when thus in a situation which seems to exact the freedom of speech from them, it perhaps would be deemed presumptuous, if they were to interpose themselves. A very respectable master, now living, once was bold enough to put in his claim to a share of the judicial function when thus sitting as *co-judex*, by avowing and defending a difference of opinion; and it is said, that inspired by his example a brother

master

* It appears that the master of the rolls, who is the advocate of the law, is the master of the law.

But from the bench. But this is the only instance of *voluntary* interference with business on the bench by a master, which I ever heard of: and as to *involuntary* opinions, so rarely have they been asked for in the two last centuries, that it would be a species of cruel surprize now to call for their sentiments in court, without a previous notice, that such assistance will be in future expected. How far it might be proper to attempt reviving the antient usage of treating masters on the chancery bench as *real* and *effective* assessors, is a point most fit to be considered by the high judge, for whose assistance, in the arduous task of administering equity, they were originally elevated by the constitution into such nearness to him. The reasons in favour of any arrangement of this sort are far more strongly urged in the treatise itself, than I should be able to state them. If there be any real weight in those reasons, it cannot be justly doubted, but that at this time they will produce their proper effect.

The fifth division of the treatise is entirely on the rewards and emoluments of masters; and amongst other propositions for the advantage of the office held by its author, one is, that masters should be allowed fees for their hearing of parties on references and for their reports. From this it seems inferable, that when the author wrote, which, as I conjecture, was between 1596 and 1603. the reward, which now constitutes the chief recompence for the only present effective duties of a master, was not then established. However it was not long before it was thought fit by the crown to make some amends to the masters for the diminution of their antient rewards from the various emoluments *, which the treatise states to have been antiently their due: for in the 18th of James the First appears, that a privy seal for fees had been recently granted to the masters; and that it became a subject of parliamentary enquiry. Whether this enquiry was in any respect grounded on

* It appears by the treatise I am remarking upon, that the office of clerk in parliament was antiently one of the collateral offices sometimes conferred on masters; and though this habit has long ceased, it can scarce be denied, that the nature of that office gives fair pretension to the expectation of professional persons. The gentleman who now so ably performs its duties as clerk assistant is a proof, how useful it is to yield to the weight of such claims. The present clerk and clerk of the commons, both of whom are barristers, are also striking examples of the advantage from such a preference, and consequently confer honour on those from whom it proceeded.

on the generality of the provision against fees by the statute of 1. Jam. 1. for the better execution of justice, from any doubt of there being any inherent power in the crown to burthen the subject with new fees of office, from any objection to the extent of the fees so granted, or from any exaction under colour of them, I am not sufficiently informed. But whatever the cause of the enquiry might be, this dispute about the fees of masters certainly became serious; as appears by the journals and debates of the commons in 1620 and 1621. Indeed the attack was more especially to be feared; because the complaints against lord Bacon, as chancellor, had at that time without doubt excited no inconsiderable portion of prejudice against all connected with him in the administration of equity. But I have not as yet discovered, that this parliamentary investigation was followed with any alteration of the fees, thus examined probably with a view to their condemnation: and certain it is that the present reward of masters in chancery is so very slender, independently of official fees (either the same as those appointed by the before-mentioned privy seal, or others of a like kind since established in their place) that, without such fees, none could undertake an office of such rank and so onerous a real duty, except the few who are possessed both of fortune and zeal enough to undertake labouring officially for the public benefit without any sort of reward. Here then this subject is brought to a point, which well deserves attention: namely, whether it would not be greatly for the public benefit to render the still important, though perhaps greatly curtailed, office of a master in chancery quite independent of fees; an idea which might be executed, by securing to them a permanent salary adequate to their labors and rank, and appropriating the fees received at their offices to the augmentation of the public revenue. Such an arrangement would probably not only create the respect so essential to the discharge of duties, which the whole nation is necessarily interested; but at the same time tend greatly to quicken the various business of suitors in equity before masters, and so remove the pretence of imputation against the very respectable description of persons, on which the office is generally conferred. With respect to the present masters, all of whom I believe to be of unimpeachable estimation, it is not probable that they will be obstacles to any such arrangement as I have here

ed. With some few of them I have the honour of being personally intimate; and I am convinced, that at least their nice sensibility will be relieved by such a change. Of all the others, my impression from their characters tends to induce a belief, that they would not be less obliged by it.

IV.—V.

The fourth article of the volume consists of two curious and ancient remnants concerning the jurisdiction of equity, as it was variously considered in the time of the famous author of the Doctor and Student; that is, both by the then enemies and friends of that lofty branch of jurisdiction.

The fifth article of the volume seems to have been an effort of lord Hale to compromise the disputes between the courts of king's bench and the common pleas, whilst he was chief baron. Those, who chuse to enter further into the merits of that unpleasant controversy, may be gratified by consulting the account of it in the life of lord keeper North by his brother the honourable mr. Roger North, and in the learned introduction to mr. Crompton's Practice of the King's Bench.

VI.—VII.—VIII.

On the sixth tract I beg leave to observe, that though it was confessedly written from an alarm taken, lest the king's bench, when lord chief justice Lee presided, should determine for the jurisdiction of that court by *latitat* over Wales; yet the event of the case alluded to did not wholly justify the apprehension. What the opinion is, which is said to have laterly prevailed in favour of such a jurisdiction, may be seen by consulting the case of Perry and Jones, in mr. Douglas's Reports; as also how far it is countenanced by the Welch act of the 13. G. 3. c. 51.

On mr. Norbury's tract, which is the seventh article, it is proper to apprise the reader, that, by some manuscripts in my possession, he appears to have been a very stirring person against the abuses of chancery during lord Bacon's administration of that jurisdiction; that he was the leading witness in the attack made upon the masters of that time; and that I have a copy of the deposition he made against them before
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a committee of the upper house of parliament. There is a great probability of his having been a practitioner in chancery; but whether as a barrister or not, I cannot now ascertain: nor can I pretend to say, whether the spur to his activity was pure zeal, or a zeal mixed with personal interest or resentment. There is certainly a considerable acrimony in the stile both of his tract and his deposition. At the same time, it is due to him to acknowledge, that there are points in both, which deserve to be remembered. They at least may serve towards filling up one chasm in the history of equitable jurisdiction; and as such assist any, who shall hereafter think fit to investigate the progress of that high and interesting branch of English jurisprudence.

The eighth tract, which is a collection made by myself some years ago in the course of my profession, I leave wholly to the mercy of the reader. If it shall serve on any occasion to assist his search after the authorities in our books on the effect of sentences by one court when adduced in another, it is the utmost I can expect from such a performance.

IX.

The ninth article of the volume I consider as an important one.—It is an argument on a great and leading principle of the law of real property, which has been long the subject of such warm controversy, that in my private judgment it is essential to have the application of it rendered easy enough to be under the ready management of every Tyro in the profession.—It comes from the hand of a great master in law; and though with all my admiration of its great author, I cannot yield to his classification of the rule in question as flexible and subordinate; yet in almost every other point of view I am struck with its excellence.—I was not present when it was publicly delivered; but I have often heard it admired as one of the best compositions, which had lately graced Westminster-hall: and from the various notes of it which I had seen before its author condescended to read it to me, (which favour was actually conferred upon me a short time before his death) my expectations were highly raised. My possession of it since the author's death was by purchase from the person, who derived his title from the worthy surviving executor of sir William Blackstone, under a sale of the manuscript, for the benefit of his estate, avowed to have been made with a view to publication.

eration.—Its being omitted in the printed volume of his reports will, without something more, be insufficient to prove, that sir William meant to suppress it. The argument it is true was not in the judges note-book, having been written on a separate paper.—But the report in the book, from which his note of Perrin and Blake in the printed reports is taken, applies to the case when argued in the king's bench, which was before he was made a judge: and as he could not then foresee, that he was ever to give his opinion as a judge, nor could indeed know that he should ever again have occasion to introduce the case; the probability is, that no room was left in the note-book for its insertion.—That it was not the intention of sir William's executor *finally* to suppress it, is plain from his telling to one, whom he knew to be a purchaser with a view to printing it. Nor is it clear to me, that any thing is to be inferred as to his *ever* having had such an intention; because it is probable, that the separate paper had escaped observation, till it was too late to insert it in the judge's printed reports; and I will remember, that I after the publication of them, under that impression, wrote to mr. Cadell the bookseller, to give notice to the executor of there being such a manuscript argument on a separate paper, which probably was the first cause of its being attended to.—Besides all this, those, who are sufficiently acquainted with my devoted respect for this most eminent commentator on the laws of England, cannot reasonably suspect me of being easily betrayed into any measure tending to injure his fame. Often have I remonstrated to various persons, for whose opinions I have the highest respect, that, notwithstanding the wonderful merit of that great work his commentaries, still they were only elements of our law, only written for students, not designed for profound experienced lawyers, such as are either the fixed ornaments of their country, on the elevated seats of justice, or move as shining though secondary planets in our juridical world. If the commentaries of mr. Blackstone have attracted the attention of great judges and eminent counsel before sufficiently enlightened; have been critically read and ardently studied by persons of such description; it is the strongest possible proof of a commanding excellence: and though such persons should be blemished in every page, it will be at once obviated, by reminding them of the nature of the work, and of their unrequited condescension in examining its contents. Such is the point of view, in which I have ever considered these famous commen-

commentaries of an almost second Hale. With such extreme partiality for judge Blackstone's writings, is it probable, that for the sake of swelling a volume too large without the aid of the few sheets from the argument in question, or for any other personal consideration, I should buy and publish the argument, if I did not see enough in it to prevent all injury to his fame?—Should even this large explanation not satisfy any of my readers, I have only to observe further, that, from the number of current notes of the argument in question, considering the concealment of its demerits, if the only error I impute to it should deserve so harsh an appellation, is a thing absolutely impossible: and that it being so, it is surely more fit, that it should come forth in its most perfect state, than that it should be transmitted to posterity with those additional imperfections which necessarily belong to the best and most faithful notes ever yet taken.

X.

The tenth article, though delivered by the editor as a speech, was in truth a written argument in an equity cause, the last stage of which his professional assistance was required. Written speeches, in the courts of justice, must ever cost very great labour; such, as with extensive business at the bar, is absolutely impracticable. Yet there are some nice points, both of law and equity, which, in respect of the extreme precision requisite to a proper treatment of them, may be more satisfactorily elucidated in that way, than by the most brilliant energy of rhetorical eloquence. However I am forced to confess, that I had a more mortifying inducement for being thus compared with written notes. Those, to whom nature has denied her more rare and precious gifts, must be content with labouring to supply the deficiency from her niggardness, in the best manner their inferior resources will allow.

XI.

The present volume closes with an effort made by the editor on an interesting subject, which, as I have long persuaded myself, is become involved in the veil of mysterious and dangerous uncertainty. For many years together I have opened my mind freely to a great number

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extreme, and personally conversing. Many of these have often urged me to reduce my conceptions into writing; seemingly under a hope, that the result of my study of the subject would prove of real utility to the profession. Notwithstanding also the consciousness of my general inferiority, it has often struck my mind, that in this one instance my elucidation, if I could but succeed in giving due force and order to my manner of considering the subject, might eradicate what I imagine to be current errors, or at least semblances of errors; and that by conciliating both sides in a long and famous controversy into the same opinion, I might ensure the undisturbed continuance of a rule of law, which I consider as one of the great safeguards to the simplicity and consistency of our system in relation to real property. Till within these few months, however, I have not possessed resolution enough to engage in an undertaking liable to a double objection:—the certain one of being arduous, because the plainest truths, when once questioned, are often most difficult to be proved;—the probable danger of having my humble endeavours to effectuate a service, for the use of the profession of which I am proud to be a member, greatly misunderstood, and consequently treated as both presumptuous and invidious. But these objections at length failed of their effect; and a short time ago I plunged into the enterprize, which my mind had so long meditated, and yet so long avoided. Scarce however had I completed the half of the undertaking, before I fell once more under the apprehensions of danger; by again recollecting, that to combat the error I had to contend with, was impracticable, without in some degree exposing myself to the imputation of boldness in questioning the sentiments of my superiors. In consequence also of this sort of impression, I at length resolved to be satisfied for the present with an attempt to elucidate the *principle* of the rule in Shelley's case. My observations therefore terminate rather abruptly; and I reserve a pointed application of the authorities, with an answer to the various objections likely to be opposed against my ideas of the rule, till I shall be able to see, how far the first part of my labors on this famous subject shall be acceptable. Should I never resume the subject, the reader can have no great cause to complain of the deficiency; because he may find it better applied than most probably is within the compass of my best exertions,

exertions, by resorting to that profound book, the Essay on Contingent Remainders *: or should an arrangement of the authorities, more particularly framed with a view to my representation of the rule as *absolute* and *imperative*, be necessary? I have reason to think, that my friend the continuator of the new edition of Coke upon Littleton † will take some opportunity of pursuing the subject where I have left it. If I did not believe that the former of these gentlemen was possessed of candour proportionate to the greatness of his talents and learning, I should have cause to doubt, whether he may not be displeased at seeing the rule, so zealously and successfully defended by him, once more explored on principles in some respect seemingly more large and decisive than those to which he has appealed. With respect to the latter gentleman, it is a justice due from me here to confess that for three or four weeks past, during which I have been much occupied in giving a finish to my observations on the rule in Shelley's case, he has kindly seized every opportunity of conferring with and assisting me in putting my notions to a far more severe test, than they are exposed to from any thing I have heretofore heard advanced by those who are unfriendly to the rule.

The reader, I hope, will not be offended with the appellation of *enemies* and *friends* to the rule in Shelley's case. I gave in the use of those appellations, merely to avoid circuitry of expression: nor is it in the most remote degree intended to insinuate that those on either side of the controversy are influenced by any other consideration, than the desire of settling the application of the rule in a manner most consonant to the law of the land.

I shall be sorry if it should be questioned, whether there is any such wonderful difference of opinions, or any such embarrassment about the rule as I have stated. For many years I have understood, that notwithstanding the profusion of cases and learning on the subject; notwithstanding even the great case of Perrin and Blake; there was still adherent to the manner

reasoning

* The ESSAY ON REMAINDERS AND EXECUTORY DEVICES, by Charles Fearn, esquire.

† Charles Butler, esquire, already mentioned.

reasoning upon the rule such an abundance of difficulties, as still left it entrenched in a sort of mysterious abstruseness: nor would it be difficult to prove this from the various notes of the opinions given by the judges in that very case; though I shall ever be exceedingly averse to so invidious and pointed a remark, as such an investigation would necessarily lead into. Under this idea of subsisting discord and embarrassment, I projected to write my observations. Under the influence of the same idea I at length actually wrote them, in order to prove, that, taken in the true point of view, the rule in question is, of all rules of law, one of the most simple and facile in application. At this very moment I remain under the same persuasion. If I am well founded, my superiors, from whom in every other respect I stand so far removed, will I trust disdain to deny one single error, rather than allow to me the single merit of assisting to exonerate the jurisprudence of the country from the reproach and other ill effects incident to it.

It may be said perhaps, that there is no *novelty* in my manner of explaining the rule. My answer is, that it is *antiquity*, not *novelty*, which I aspire to exhibit:—*remote antiquity*, rescued from the ravages of *modern* ingenuity. When lord Coke heard Shelley's cause debated, it was not necessary to explore the foundations of the rule; because all admitted its force; and the sole question was, whether the premises, on which only it can fairly operate, really existed in that case; namely, whether by *heirs male of the body*, there being a repetition of those words superadded, all the male issue *in infinitum* of the tenant for life was included, or only such male issue as should at the single moment of his death answer to that description. But far different has been the course of argument for almost a century back; for the rule has actually been argued, as if the question was, whether it is convenient to a testator's design in point of effect to apply the rule; and thus a rule *imperative* to intention has been made almost a *slave* to it. Hence all the abstruseness, all the mystery, all the profusion of cases and learning, all the endless ambiguities, which render a rule, the application of which ought to be as easy as the winding up of a watch, almost as difficult as the first invention of one. The discovery, if I have made one, is, that the rule has been disguised by the learned superinductions of

modern times; and that seen in its genuine antient garb it is simplicity itself.

Perhaps at last it may be said by some, that the controversy is merely *verbal*, and that all substantially mean the same thing.—Be it so.—I answer, that whatever may be the best denomination for the controversy, if it really subsists in any form, the consequential uncertainties ought to be obviated.

AUT CÆSAR AUT NULLUS was at one time made the motto to my observations on the rule in Shelley's case; because it seemed to me shortly and emphatically to prepare the reader for my sense of the rule. But a very ingenious barrister*, the importance of whose History of our Law lays the profession under no light obligation, kindly suggested, that it might be misinterpreted into a sort of boast. Therefore upon cancelling the printed copies of the first sheet of the Observations, I withdrew the motto, though I confess not without reluctance.—This is a small circumstance to take notice of; but it is recompensed to myself by the pleasure I have in endeavouring to draw attention to a juridical History of real value.

Scarce beyond one sentence more remains for the conclusion of this long Preface.—As this volume was from the beginning designed for the use of the whole profession of the law in all its branches, so it is now most respectfully presented for their universal acceptance; with an entreaty, that the zeal, with which I have thus attempted to promote professional knowledge, may receive from professional candour and liberality a generous shelter for all my errors and imperfections, and perfect security against all kinds of harsh and invidious construction.—First looking up to our grave and reverend judges, I solicit indulgence from their dignity and wisdom.—Next approaching to those stars of eloquence and learning, which now enlighten and adorn our English forum, and which under that description therefore will be as fully known as if each was here named, I feel assured even of too partial a countenance from their sensibility, from their elevation of mind; nay, in respect to some of them, from their friend-

* John Reeves, esquire.

P R E F A C E.

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garb it is ship.—Lastly, surveying all the rest, who are variously connect-
ed with the study and practice of English law, I derive hope of
favourable reception, from their general disposition to encour-
age every individual of their community, whose labor of mind
makes their accommodation its object.

BOSWELL COURT,
Nov. 25, 1786.

FRA. HARGRAVE.

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Vol. 1

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T R E A T I S E,

IN THREE PARTS.

“ P A R S P R I M A .

97. “ *De Jure Maris et Brachiorum ejusdem.* ”

“ P A R S S E C U N D A .

“ *De Portibus Maris.* ”

“ P A R S T E R T I A .

Concerning the Customs of Goods imported and
exported.”

F R O M A

MANUSCRIPT of LORD CHIEF-JUSTICE HALE.

*Conclusion in
the latter part
of Chap. 25. of
part 3. especially
mentioned to be written
29. March
1667. F. H. G.*

The manuscript, from which this treatise is printed, was part of the valuable present to the editor from GEORGE HARDINGE, Esquire, Sollicitor-General to the Queen; for which acknowledgement is made in the preface to this volume. There cannot be the least doubt of its being written by lord chief-justice HALE; though it is not in his hand-writing, but appears to be a fair copy by some transcriber. The contents agree with the article No. 20. and 21. in the list of lord chief-justice HALE's manuscripts at the end of his life by bishop BURNET. The title of the manuscript is *verbatim*, as here given by the words between the marks of quotation.]

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T H E
T A B L E.
P A R S I^{ma}.

C O N T A I N I N G,

- AP. 1. **C** O N C E R N I N G the interest of fresh rivers.
 2. Of the right or prerogative in private or fresh rivers.
 3. Concerning public streams.
 4. Concerning the king's interest in salt waters, the sea and its arms, and the soil thereof; and the right of fishing there.
 5. The right which a subject may have in the creeks or arms of the sea, and how it may be acquired.
 6. Concerning the ownership or propriety which a subject may have in the sea-shore and maritime increments, &c.
 7. Concerning the prerogative and franchise of wreck, and its kinds; and royal fish.

P A R S II^{da}.

- AP. 1. The method of the discourse, &c.
 2. Touching the names of roads, havens, ports and creeks, &c.
 3. Concerning the manner of erecting of ports, and by whom it may be done.
 4. Touching the title or origination of ports, by prescription, patent, or charter.
 5. Where the king may erect a port to the prejudice of another, and concerning restrictive clauses in charters to ports.
 6. Touching the threefold right in ports.
 7. Concerning the *jus publicum* of ports and harbours.
 8. Concerning the *jus regium*, or the king's right or prerogative in ports of the sea.
 9. Concerning the *jus regium* in ports of the sea, in relation to commerce and trade.
 10. Concerning the *jus regium* in the ports with relation to the customs.
 11. Touching the officers of the customs attending the customs, the tronage or king's beam, and the coquet or certificate of customs paid.
 12. Concerning the *five ports*; their names, privileges and charges.

P A R S III^{tia}.

- P. 1. The order and method of the whole discourse.
 2. Concerning prizage of wines, its nature, original, and progress.
 3. Touching exemptions from prizage, and the translation of the duty itself to a subject.
 4. Concerning the customary duties that are or were anciently due in ports by usage or custom.

T H E T A B L E.

5. Concerning the king's customs, and how they stood before the time of king E. I.
6. The narrative of the customs, and their several origins and alterations, as they stood in the time of king Edw. I.
7. The farther prosecution of the business of the customs in the time of king E. I.
8. Concerning customs, subsidies, and impositions, *temp. Edw. I.*
9. The proceedings touching subsidies, customs, and impositions, during the reign of king Edw. III.
10. The state of the subsidies, customs, and impositions during the reign of Rich. II.
11. Concerning the state of the customs, subsidies, and impositions of goods exported and imported in the time of Hen. IV.
12. Concerning the customs and subsidies of merchandises *temp. Hen. V.*
13. Concerning the customs and subsidies of merchandises *temp. Hen. VI.*
14. Concerning ditto *temporibus* Edw. IV. Rich. VII. Hen. VII. Hen. VIII. and Edw. VI.
15. Concerning ditto, and impositions *temporibus* q. Mary. q. Elizabeth, and k. James.
16. Concerning ditto, as they now stand *temp. Cha. II.*
17. A general scheme of the customs as they stood in the time of Edw. IV.
18. Concerning aliens and their customs, and the Haverham merchants, &c.
19. Concerning aliens at large, and who are liable to alien customs.
20. When customs and subsidies shall be said to be due, and when not.
21. Concerning the entry of goods inwards and outwards and how to be made.
22. What shall be said a shipping to entitle the king to subsidies, &c.
23. Concerning the times and places for lading and unlading of goods.
24. Touching repayment of customs or duties once paid in emergencies.
25. Concerning the custom of Newcastle coals, its origin and progress.
26. A general discourse touching the customs of cloaths, as they are exported as sold within the kingdom, and therein concerning alnage.
27. Concerning the subsidy of alnage.
28. Concerning things taken upon the sea, letters of marque and reprisal.

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P A R S P R I M A.

De Jure Maris et Brachiorum ejusdem.

After publication of this volume of Law Tracts, I gave to me a manuscript in Lord Hale's hand-writing C A P. I. consisting of two parts. The first is entitled A Narrative legal
Concerning the interest of fresh rivers.

FRESH rivers of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquæ*; and the owners of the other side the right of soil or ownership and fishing unto the *filum aquæ* on their side. And if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience.

Vide Mich. 18. 19. Ed. 1. B. R. Rot. Nott. in an affize by Robert Baker against Hugh Hercy for hindering his fishing in the water of Idell.

Furatores dicunt, quod prædictus Hugo non tenet prædictam piscariam in separali suo, simul cum Roberto Mortayn; quia dicunt, quod omnes, qui tenent terras abutantes super aquam illam, in ea piscantur pro voluntate sua usque filum aquæ, sicut illi de Grenely ex parte orientali, et illi de Stratford ex parte occidentali. Dicunt etiam, quod quædam pars villæ de Stratford est de feodo de Lancastria, abutans se super aquam prædictam, et ipsi de feodo illo piscantur usque filum aquæ. Hugo in Misericordia.

And so it was accordingly agreed upon evidence, *Tr. 2. Jac. B. R. Owen et Dunch. Vide 8. H. 7. 5. 22. Aff: 93. Rastall's Entries 666, et sæpius alibi.*

But special usage may alter that common presumption; for one man may have the river, and others the soil adjacent; or one man may have the river and soil thereof, and another the free or several fishing in that river.

If a fresh river between the lands of two lords or owners do insensibly gain on one or the other side; it is held, *22. Aff: 93.* that the propriety continues as before in the river. But if it be done sensibly and suddenly, then the ownership of the soil remains according to the former bounds. As if the river running between the lands of A and B, leaves his course, and sensibly

fenfibly makes his channel intirely in the lands of A, the whole river belongs to A; *aqua cedit solo*: and so it is, though if the alteration be by insensible degrees, but there be other known boundaries as stakes or extent of land. 22. Aff. pl. 93. And though the book make a question, whether it hold the same law in the case of the sea or the arms of it, yet certainly the law will be all one, as we shall have occasion to shew in the ensuing discourse.

But yet special custom may alter the case in great rivers. For instance, the river of Severn, which is a wild river, yet, by the common custom used below Gloucester bridge, it is the common boundary of the manors of either side, what course soever the river takes; viz. the *filum aquæ* is the common mark or boundary, though it borrow great quantities of land, sometimes of one side, sometimes of the other, and gives them to the opposite shore.

Though fresh rivers are in point of propriety as before *primâ facie* of a private interest; yet as well fresh rivers as salt, or such as flow and reflow, may be under these two servitudes, or affected with them; viz. one of prerogative belonging to the king, and another of public interest, or belonging to the people in general.

Of these in the ensuing chapters.

Concerning the latter, we begin with chap. 3. which though in the title confined to public interest, in such private the public is liable to common passage.

Of the right of prerogative in private or fresh rivers.

THE king by an ancient right of prerogative hath had a certain interest in many fresh rivers, even where the sea doth not flow or reflow, as well as in salt or armes of the sea; and those are these which follow.

1st. A right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequent tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation; viz. that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these, he is fineable. And hence it is, that if a common bridge be broken, whereby there is no passage but by a boat or ferry, it hath been anciently practised in the

the Exchequer to compel that ferryman, that ferries over people for profit without a charter from the king or a lawful prescription, to accompt for the benefit above his reasonable pains and charge. *Communia Pasche*, 20. E. 3. in *Scaccario*. *Vide Claus.* 36. E. 3. m. 10. The bridge called Heckbeth bridge being in decay, neither was it well known who should repair it; the king grants a temporary ferry and certain particular rates for passengers, appoints the profits to be taken in the first place for defraying of the charge of the barge and bargemen; and if it can appear who is by tenure to repair it, then surplussage of the profits of the ferry to be answered to the king; and if that cannot be known, then *charitatis intuitu* the king allows it to the repair of the bridge.

And this, that is said in reference to a fresh or private river, holds place much more in a public river or arm of the sea; and therefore it need not be repeated when we come to that subject.

2dly. An *interest*, as I may call it, of *pleasure* or recreation. Before the statute of *Magna Charta* cap. 16. it was frequent for the king to put as well fresh as salt rivers in *defensio* for his recreation; that is, to bar fishing or fowling in a river till the king had taken his pleasure or advantage of the writ or precept *defensione ripariæ*, which anciently was directed to the sheriff to prohibit riviation in any rivers in his bailiwick. But by that statute it is enacted, *quod nullæ ripariæ defendantur de cetero, nisi illæ quæ fuerunt in defenso tempore Henrici regis avi nostri, et per eadem loca et per eosdem terminos, sicut esse consueverunt tempore suo*.

After this statute the *Ripariorum defensiones* ran thus, as appears *Claus.* 20. H. 3. m. 3. *dorso*. *Claus.* 22. H. 3. m. 2. *dorso, et sæpius alibi*.

Rex Vicecomiti Wigornie salutem. Præcipimus tibi, quod sine latione clamari facias et firmiter prohiberi ex parte nostrâ, ut nullus de cetero eat ad riviandum in ripariis nostris in ballivâ tuâ, quæ in defenso fuerunt tempore Henrici regis avi nostri; et scire facias omnibus de comitatu tuo, qui ab antiquo facere debent pontes riparias illas, quod provideant sibi de pontibus illis, ita quod prompti sint et parati in adventu nostro quando eis scire faciemus.

And thus it was written to most counties.

But because this left the country in a great uncertainty in the writs of 22. H. 3. so afterwards it mentioned some one particular river;

Et in alijs riparijs in ballivâ tuâ, quæ in defenso esse consueverunt tempore Henrici regis avi nostri;

As Avon in Worcestershire, Bladen in Oxfordshire, Mules Surrey, &c.

This

This hath been long disused; for it created a great trouble to the country; and little benefit or addition of pleasure to the king.

3d. An *interest of jurisdiction*; viz. in reference to common nuisances in or by rivers; as where the sewers were not kept which gave the rise to the commission of Sewers, as well for fresh rivers as for salt. *Vide Stat. 23. H. 8. cap. 5.* The Commission thereby enacted recites this part of the king's jurisdiction, viz.

"We therefore, for that by reason of our royal dignity and prerogative royal we are bound to provide for the safety and preservation of our realm," &c.

And another part of the king's jurisdiction in reformation of nuisances, is, to reform and punish nuisances in all rivers whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats to reform the obstructions or annoyances that are therein for such common passage: for as the common highways on the land are for the common land passage, so these kind of rivers whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called *altæ regie*, so these publick rivers for public passage are called *flumina regales*, and *haut streames le Roy*; not in reference to the propriety of the river, but to the publick use; all things of public safety and convenience being in a special manner under the king's care, supervision, and protection. And therefore the report in Sir John Davyes, of the piscary of Ban, mistakes the reason of those books, that call these *streames le roy*, as if they were so called in respect of propriety, as 19. Aff. 6. D. 11. for they are called so, because they are of public use, and under the king's special care and protection, whether the fish be his or not.

And this leads me to the third chapter.

C A P. III.

Concerning public streams.

THERE be some streams or rivers, that are private only in propriety or ownership, but also in use, as in streams and rivers that are not a common passage for the king's people. Again, there be other rivers, as well for as salt, that are of common or publick use for carriage

boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *primâ facie publici juris*, common highways for man or goods or both from one inland town to another. Thus the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they are become to be of private propriety as in what parts they are of the king's propriety, are publick rivers *juris publici*. And therefore all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments, and removed; and this was the reason of the statute of *Magna Charta cap. 23.*

Omnes kidelli deponantur per Thamysiam et Medwayam, et per totam Angliam nisi per cofteram maris.

These kinds of nuisances were such, as hindered or obstructed the passage of boats, as wears, piles, choaking up the passage with filth, diverting of the river by cutts or trenches, decay of the banks, or the like.

And they were reformed, Sometimes by indictments or presentments in the leets, sessions of the peace, oyer and terminer, or before justices of assize.

Oftentimes in the king's bench; as *Hil. 50. E. 3. B. R. Rot. 23.* for nuisances in the river of Trent; *H. 23. E. 3. B. R. Rot. 61.* in the river Ouse; *H. 21. E. 1.* in the river Severn; *Tr. 28. E. 3. Rot. 29.* in the river Leigh; and generally in all other rivers within the bodies of counties, which had common passage of boats or barges, whether the water were fresh or salt, the king's or a subject's, *Rot. Parliamenti 14. R. 2. n. 34. Mich. 36. E. 3. B. R. Rot. 65. Mich. 18, 19. E. 1. B. R.* and infinite more.

Sometimes by special commission; as for the river of Leigh, *19. Ass. 6.*

And sometimes by the parties, that were prejudiced by such nuisance, without any process of law.

More of this we shall see when we come to consider of common nuisances in havens and ports.

But if any person at his own charge makes his own private stream to be passable for boats or barges, either by making of locks or cutts, or drawing together other streams; and hereby that river, which was his own in point of propriety become now capable of carriage of vessels; yet this seems not to make it *juris publici*, and he may pull it down again, or apply it to his own private use. For it is not hereby made to be *juris publici*, unless it were done at a common charge, or by a publick authority, or that by long continuance of time it hath been freely devoted to a publick

publick use. And so it seems also to be, if he that makes such new river or passage doth it by way of recompence or compensation for some other public stream that he hath stopped for his own conveniency; as in the case of the Abbot of St. Austin's Canterbury, mentioned in the Register. So likewise if he purchaseth the king's charter to take a reasonable toll for the passage of the king's subjects, and puts it in ure, these seem to be devoted and as it were consecrating of it to the common use. As he, though by an *ad quod damnum*, and licence thereupon obtained, changes a way, and sets out another in his own land; this new way thereupon become *juris publici*, as well as a way by prescription. For no man can take a settled or constant toll even in his own private land for a common passage without the king's licence.

C A P. IV.

See 2^o Ro. M^o. arms, and the soil thereof: and first, of the right of fishing there.

*Prerogative
the B.
p. 168.*

THUS much concerning fresh waters or inland rivers which, though they empty themselves mediately into the sea, are not called arms of the sea, either in respect of the distance or smallness of them.

We come now to consider the sea and its arms: and first, concerning the sea itself.

The sea is either that which lies within the body of a county or without.

That arm or branch of the sea which lies within the *faucibus terræ*, where a man may reasonably discern between shore and shore, is or at least may be within the body of a county, and therefore within the jurisdiction of the sheriff or coroner. 8. B. 2. *Corone* 399.

The part of the sea which lies not within the body of a county is called the main sea or ocean.

The narrow sea, adjoining to the coast of England, is part of the waft and demesnes and dominions of the king of England, whether it lie within the body of any county or not.

This is abundantly proved by that learned treatise of Master Selden called *Mare Clausum*; and therefore I shall say nothing therein, but refer the reader thither.

In this sea the king of England hath a double right, viz. a right of jurisdiction which he ordinarily exerciseth by his admiralty and a right of propriety or ownership. The latter is that which I shall meddle with.

*See the
former, the Lord Hale's
M^o. Treatise con-
cerning the Admi-
ralty Jurisdiction*

The king's right of propriety or ownership in the sea and soil thereof is evidenced principally in these things that follow.

1st. The right of fishing in this sea and the creeks and armes thereof is originally lodged in the crown, as the right of depas-uring is originally lodged in the owner of the waft whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. I shall not give many instances of this, because they are abundantly done to my hand in the book I formerly cited.

Pat. 23. E. 1. m. 6. The king grants liberty to the Hollan-ers to fish in *mari nostro prope Fernemuth.*

Rot. Parliamenti 3. H. 5. pars. 1. n. 33. The king by pro-clamation made a general inhibition of fishing upon the coasts of Ireland to the prejudice of the English. Desired to be re- called, but was not.

Rot. Parl. 8. H. 5. n. 6.

Item pry le Commons, que come nostre Seigneur le Roy et ses noble rogeniteurs de tout temps ont estre Seigneurs de le mere, et ore per le grace de Dieu est si venus, que nostre Seigneur le Roy est Seigneur de l'ist de ambe parties de le mere d'ordeiner sur tous estrangers passants l'army le dit mere tiel imposural oeps nostre Seigneur le Roy appren- re que a luy semble reasenable pur le salve gard del dit mere.

Responsio, "Le Roy s'avisera."

But though the king is the owner of this great waft, and as a consequence of his propriety hath the primary right of fishing in the sea and the creeks and armes thereof; yet the common peo-ple of England have regularly a liberty of fishing in the sea or creeks or armes thereof, as a publick common of piscary, and may not without injury to their right be restrained of it, unless in such places creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.

Mich. 19. E. 3. B. R. Rot. 127. Lincoln. The commonalty of Grimsby impleaded the fishermen of Ole, which is within five miles of Grimsby, for lading and unlading their fish and other equals at Ole;

Custumâ non solutâ, quæ est debita dictæ villæ Grimsby juxta chartas regis contra prohibitionem regis.

The defendants plead,

Quòd ipsi sunt liberi tenentes in hamletto de Thrusco, qui est infra circinctum villæ de Ole, et quòd ipsi tanquam piscatores juxta costum maris à tempore quo, &c. usi sunt piscari cum retibus et batillis suis, et pisces captos ad terram apud Thrusco et alibi in patriâ eisdem venditioni exponere, absque hoc quòd blada victualia bona aut mercimonia carcarunt aut discarcarunt aut venditioni exposue-

rent. Ideo veniat jurata.

Vide

Vide Statutum 2. E. 6. cap. 6. 5. El. cap. 5. *Brañton*, lib. cap. 12. *Jus piscandi omnibus commune in portu et in fluminibus*. It must be taken to be rivers, that are arms of the sea, and *per intuitu*; for *de facto* there doth fall out in many ports and arms of the sea an exclusion of public fishing by prescription or custom.

II. The next evidence of the king's right and propriety of the sea and the arms thereof is his right of propriety to

- (1) The shore; and
(2) The *Maritima Incrementa*.

(1.) The shore is that ground that is between the ordinary high water and low-water mark. This doth *primâ facie* and of course right belong to the king, both in the shore of the sea and shore of the arms of the sea.

And herein there will be these things examinable.

1st. What shall be said the shore, or *littus maris*.

2d. What shall be said an arm or creek of the sea.

3d. What evidence there is of the king's propriety thereof.

1. For the first of these it is certain, that that which the sea overflows, either at high-spring tides or at extraordinary tides comes not as to this purpose under the denomination of *littus maris* and consequently the king's title is not of that large extent, but only to land that is usually overflowed at ordinary tides. And I have known it ruled in the Exchequer-chamber in the case of *Vanhaesdanke* on prosecution by information against Mr. *Widdowes*, about 12. *Car. 1.* for lands in the county of *Northampton* folk, and accordingly ruled 15. *Car. B. R.* Sir Edward *Herbert* case, and *Pasch. 17. Car. 2.* in *Scaccario*, upon evidence between the Lady *Wansford's* Lessee and *Stephens*, in an *ejectione firmæ* for the town of *Cowes* in the isle of *Wight*. That therefore call the shore; that is between the common high-water and low-water mark, and no more.

2. For the second, that is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows so that the river of *Thames* above *Kingston* and the river of *Severn* above *Tewkesbury*, &c. though there they are public rivers, yet are not arms of the sea. But it seems, that, though the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and reflow as in *Thames* above the bridge.

22. *Aff. 93.* Nota que chescun ew, que flow et reflow, est pel bras de mere cy tantavint come il flow.

3. For the third, it is admitted, that *de jure communi* between the high-water and low-water mark doth *primâ facie* belong to the king, 5. *Rep. 107.* Constable's case.

Dy. 3.

(1.) Shore of the sea

Shore of the sea described.

Shore cases on this head referred to. See post. 21. reference to same 3 cases.

Arm or Creek of the sea described.

As King's presumptive right of property in both.

y. 326. Although it is true, that such shore may and commonly is parcel of the manor adjacent, and so may be belonging to a subject, as shall be shewn, yet *primâ facie* it is the king's.

And as the shore of the sea doth *primâ facie* belong to the king, viz. between the ordinary high-water and low-water mark, so the shore of an arm of the sea between the high-water and low-water mark belongs *primâ facie* to the king, though it may also belong to a subject, as shall be shewn in the next chapter.

In the case between the town of Newcastle and the prior of Tinmouth, 20. E. 1. which is afterwards, in the Second Part, chapter the 6th, more fully recited; one of the charges against the prior is, that he had built houses at Sheles upon the river of Tyne between the high-water and low-water mark. The prior pleads that it was built on his own soil.

Ubi dominus rex nullum habet solum, neque liberum tenementum, quod solum dictæ domus et liberum tenementum extendit se usque ad filum aquæ Tyne, ultra terram suam siccam, et inter quod quidem solum aquæ et terram prædictam domus prædicta habet piscariam liberam in longitudinem terræ ejusdem in eadem aquâ.

The king's attorney replied,

Quod, qualescumque mansiunculae ibidem fuerunt temporibus præcessorum prioris, idem prior, qui nunc est, tempore suo fieri fecit ibidem 26 domus super solum quod domino regi esse debet, eo quod fluxu et inundatione maris comprehenditur.

Afterwards judgment was given against the prior, but not in express terms for the soil, but implicitly. See the judgment afterwards in the Second Part, 6th chapter.

And consonant to this there was a decree *Paschæ 8. Car. 1.* the Exchequer, entered in the book of Orders of that term, fol. 66. whereby it was decreed, that the soil and ground lying between Wapping-wall and the river of Thames parcel of the port of London; and therefore and for that the same lies between the high-water and low-water marks of the river of Thames, all the houses built between the Hermitage-wharfe unto Dickshor eastward, and between the old wall of Wapping-wall on the north and the river of Thames on the south, are decreed to the king; and the same were accordingly by commission seized into the king's hands.

The title of the bill or information was laid, viz. 1st. That the river of Thames flowed and reflowed. 2d. That consequently it was an arm of the sea. 3d. That it was the king's river. 4th. That it was the king's port.—And upon all these it was concluded, that the land between the high-water and low-water mark was the king's land, and accordingly decreed.

And

Case between Newcastle and the Prior of Tinmouth. 20 E. 1. partly brought forward. accot. of the case, see part 2. Chap. 6. page 79. 20. E. 1.

Case of ground between Wapping Wall and the River Thames parcel of London. Pasch. 8. Car. 1. in force. See 2. Ant. & Rep. 607.

And this shall suffice for the king's right in the shore of the sea or rivers that are arms of the sea, viz. the land lying between the high-water and the low-water mark at ordinary tides.

(2) *Maritime*

ma/pore

menta

1. Per alluvionem

2. Per relictionem

(2.) The king hath a title to *maritima incrementa*, or increase of land by the sea; and this is of three kinds, viz.

1. Increase per *projectionem vel alluvionem*. 2. Increase per *relictionem vel desertionem*. 3. Per *insulæ productionem*.

1. The increase per *alluvionem* is, when the sea by casting up sand and earth doth by degrees increase the land, and stretch itself out further than the ancient bounds went; and this is usual. The reason why this belongs to the crown is, because in truth the soil, where there is now dry land, was formerly part of the very *fundus maris*, and consequently belonged to the king. But indeed if such alluvion be so insensible, that it cannot be by any means found that the sea was there, *id est non esse et non apparere*; the land thus increased belongs as perquisite to the owner of the land adjacent.

2. The increase per *relictionem*, or recess of the sea. This doth *de jure communi* belong to the king; for as the sea is parcel of the waste or demesne, so of necessity the land that lies under it, and therefore it belongs to the king when left by the sea; and so also it regularly holds in lands deserted by river, that is an arm of the sea or a creek of the sea *primâ facie*, especially if the creek or river be part of a port.

Claus. 10. E. 3. m. 18. Upon an inquisition finding that half an acre in the suburbs of Canterbury.

Crevit in cursu ripæ Cantuariæ per alluvionem et diluvionem dictæ ripæ,

this half acre was seized into the king's hands. But it is true, it was afterwards restored to the Abbot of St. Austin's because by another inquisition it was found,

Quid non est solum nostrum, nec accrevit per alluvionem et diluvionem dictæ ripæ, sed extitit solum abbatis, &c. à tempore cuius memoria, &c.

Car. primi, Upon an information against Oldsworth and others for that which is now called Sutton Marsh, that 30 acres of land was *relictum per mare*, and that the defendants had intruded into it; the defendants pleaded specially, and entitled themselves by prescription to the lands project by the sea; and upon a demurrer adjudged against them. That by the prescription or title made to lands project, which *jus alluvionis*, no answer is given to the title of information in lands relict, for these were of several natures. 2d, It was held, that it lies not in prescription to claim lands relict

Case of

Oldsworth

et alios

1. Per alluvionem

2. Per relictionem

3. Per productionem

30. The

former

case was

1. Per alluvionem

2. Per relictionem

3. Per productionem

30. The

former

case was

1. Per alluvionem

Sutton Marsh in Lincolnshire, Bridgman v. Rep. temp. Cha. 1. penes nos folio page 67 A. case was Rex v. Fernandez & others including Oldsworth in facciario Trin. Cha. The report is very full.

are; for so if the channel between us and France should dry
 up, a man might prescribe for it, which is unreasonable; for
Nihil prescribitur nisi quod possidetur.

But this hath some exceptions, besides these that follow in
 the ensuing chapter.

If a subject hath had by prescription the property of a cer-
 tain tract, or creek, or navigable river, or arm of the sea,
 when while it is covered with water, by certain known metes
 and extents; this, though it should be relict, the subject will
 have the propriety in the soil relict. For he had it before,
 though covered with water; and although the sea is a fluid
 thing, yet the *terra* or *solum subjectum* is fixed; and by force
 of a clear and evident usage a subject may have the propriety
 of a private river; though the acquet of the former be more
 difficult, and requires a very good evidence to make it out, as
 will be said in the ensuing chapter.

If a subject hath land adjoining the sea, and the violence of
 the sea swallow it up, but so that yet there be reasonable marks
 to continue the notice of it; or though the marks be defac-
 ed; yet if by situation and extent of quantity, and bound-
 ing upon the firm land, the same can be known, though the
 land leave this land again, or it be by art or industry regained,
 the subject doth not lose his propriety: and accordingly it was
 held by Cooke and Foster, *M. 7. Jac. C. B.* though the in-
 undation continue forty years.

If the mark remain or continue, or extent can reasonably
 be certain, the case is clear.—Vide Dy. 326.—22. Ass. 93.
 For this a notable case in the case of an overflowing by the
 Thames, which is an arm of the sea, *Rot. Parliamenti 8. E.*
m. 23. pro Willielmo Burnello. Phillip Burnell, father of
 William, being seized of the manor of Hacchesham near
 Greenwich, died his heir within age during his minority.

*Aqua Thamisse magnam partem terræ et prati manerij prædicti
 aliarum terrarum contiguarum superundavit.*

The bishop of Bath and Wells, by agreement with the
 king, was to stop the breach at his own charges, and was to
 hold the land for seven years to reimburse his charges. This
 he did, and the land was regained, and the bishop held the
 land for his seven years, and three years over them. Burnell
 desired relief for his land in parliament against the Bishop.
 The answer was,

Sequatur versus episcopum ad communem legem;
 which would not have been, if the king had been intituled
 to the inundation.

Case of Stebunhith or Stepney Marsh in Parl. 10. E. 2.
 P. 18. E. 2. Rot. 174. B. R. upon the like account a considerable quantity of marsh ground, containing 100 acres parcel of the manor of Stebunhith, was regained from the Thames, and enjoyed accordingly. I think it is the same that is now called Stepney Marsh, or at least some part of the manor now built upon and contiguous to the Thames. The record is worth the reading, but long.

Case of Vill of Shinberge in Gloucestershire 10. H. 3.
 Claus. 18. H. 3. m. 21. pro Villata de Shinberg in Gloucestershire.

Rex Vicecomiti, &c. Quia accepimus per inquisitionem, quam fecimus, quod illa pars terræ, quam utraque villata de Shinbridge et Aure sibi vendicant, eo quod aqua Sabrinæ eam occupavit super campum de Shinberge versus campum de Aure, et postea processu temporis eam rejectit ad campum de Shinberge, antequam sic rejecta esset per aquam Sabrinæ; de jure pertinuit ad villam de Shinbridge, et in parte fuit terra arabilis, et in parte pastura, ad eandem villam de Shinbridge pertinens per divisam fossati, quod vocatur Hedgewood: precipimus tibi, quod eidem villatæ de Shinberge plenam seisinam de prædictâ parte terræ habere facias. Teste Rege apud Gloucesteriam.

The river of Severn had gained upon Shinbridge so much that its channel ran over part of Shinbridge lands, and led part thereof unto the other side, and then threw it back again to Shinberge. It shall not belong to Aure. Neither was it at all claimed by the king, though Severn in that place be an arm of the sea. But it was restored to Shinberge as before.

But the truth is, that there the *maritima incrementa* of the river belong to the barons of Barclay, as shall be shewn. Yet the property of the soil was not lost to the owners that had it before.

And the truth is also, that river, which is a wild unruly river, and many times shifts its channel, especially in the flat between Shinberge and Aure, is the common boundary between the manors of either side, viz. the *filum aquæ*, in the middle of the stream. And this is the custom of the manors contiguous to that river from Gloucester down to Aure, which was not taken notice of in that record. Yet it serves for this purpose to shew, that the king gained not the propriety against the town by such inundation.

It is true, here were the old bounds or marks continuing viz. the Hedgewood. But suppose the inundation of the river deface the marks and boundaries, yet if the certain extent of the contents from the land not overflowed can be evidenced, though the bounds be defaced, yet it shall be returned to the owners according to those quantities and extents that it formerly had. Only if any man be at the charge of inning of it, he seems by a decree of Sewers he may hold it till he be reimbursed.

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embursed his charges, as was done in the case of Burnell
 fore alledged. But if it be freely left again by the reflux
 recess of the sea, the owner may have his land as before,
 he can make it out where and what it was; for he cannot
 his propriety of the soil, though it be for a time become
 of the sea, and within the admiral jurisdiction while it so
 continues.

The third sort of maritime increase are islands arising de
 in the king's seas, or the king's armes thereof. These
 on the same account and reason *primâ facie* and of common
 belong to the king; for they are part of that soil of the
 that belonged before in point of propriety to the king:
 when islands *de novo* arise, it is either by the recess or sink-
 of the water, or else by the exaggeration of sand and flubb,
 ch in process of time grow firm land invironed with wa-
 and thus some places have arisen, and their original re-
 ded, as about Ravensend in Yorkshire.
 and thus much of the king's right of propriety which he
 in the sea, and also *primâ facie* and in common presump-
 in the ports and creeks and armes of the sea.

3. Mari-
 time increase
 per productio-
 nem solum.

C A P. V.

right which a subject may have in the creeks or armes of the
 sea, and how it may be acquired.

ALTHOUGH the king hath *primâ facie* this right in
 the armes and creeks of the sea *communi jure*, and in
 mon presumption, yet a subject may have such a right.
 and this he may have two ways.

1. By the king's charter or grant; and this is without
 tion. The king may graht fishing within a creek of the
 or in some known precinct that hath known bounds,
 gh within the main sea. He may also grant that very
 est itself, viz. a navigable river that is an arm of the sea,
 water and soil thereof. He may also grant a manor *cum*
et maris eidem adjacentē; and the shore itself will pass,
 gh in gross and not parcel of the manor. He may also
 a manor or land contiguous to the sea, *unâ cum maritimis*
mentis, and that will pass that *jus alluvionis*, whereof be-
Vide Cartæ Antiquæ, G. 15. Grant 6. Johannis to the
de Bello loco, viz. alveum super quem abbatia fundata est à
de Hartford cum fluctu maris in ascendendo et descendendo in-
ramque ripam.

ol. 1.

C

Vide

Vide ibidem, I. 17. Carta Willielmi primi abbati sancti augustini de totâ terrâ Eſtanore et totum littus uſque medietatem aquæ

Vide ibidem, Carta Knuti monachis ſancti Auguſtini de iſulâ Thanet, tam in terrâ quàm in mari et littore.

Vide ibidem, F. 17. A grant by king William the firſt to the monks of Trinity, Canterbury, of divers liberties in the poſſeſſions in terrâ et in mari.

Vide Cartæ Antiquæ, O. 1. A grant by Edward the Confeſſor to the abbey of Hulm, *videlicet, wreccum in mari et littore maris et in portubus maris. Cartæ Antiquæ, D. D. 2.*

But it ſeems the grant of *incrementa maritima* will not paſs lands that often happen to be reliet by the ſea; becauſe it is not ſo properly *maritimum incrementum*. And beſides, the ſoil itſelf under the water is actually the king's, and can paſs from him by ſuch an incertain grant as *maritima incrementa*; but it muſt paſs a preſent intereſt.

But if the king will grant land adjacent to the ſea unâ mille acris terræ aquâ maris coopertis eâdem terræ ſecundum conſuetudinem, &c. adjacentibus; ſuch a grant, as it may be preſented will paſs the ſoil itſelf; and if there ſhall be a receſs of the ſea leaving ſuch a quantity of land, it will belong to the grantee.

2d. The ſecond right is that which is acquired or acquirable to a ſubject by cuſtom or preſcription; and I think it is clear, that the ſubject may by cuſtom and uſage or preſcription have the true propriety and intereſt of many of the ſeveral maritime intereſts, which we have before ſtated to be *primâ facie* belonging to the king. I will go over them particularly, and ſet down which of theſe intereſts are acquired by uſage or preſcription by a ſubject.

A ſubject may by preſcription have the intereſt of fiſhing in an arm of the ſea, in a creek or port of the ſea, or in a certain precinct or extent lying within the ſea; and theſe are only free fiſhing, but ſeverall fiſhing.

Fiſhing may be of two kinds ordinarily, viz. the fiſhing with the net, which may be either as a liberty without ſoil, or as a liberty ariſing by reaſon of and in concurrence with the ſoil, or intereſt or propriety of it; or otherwiſe it is a local fiſhing, that ariſeth by and from the propriety of the ſoil. Such are *gurgites*, weares, fiſhing-places, *borachia ſtacha*, &c. which are the very ſoil itſelf, and are frequently agreed in our books. And ſuch as theſe a ſubject may have by uſage either in groſſe, as many religious houſes had; or as parcell of or appendant to their manors, both corporations and others have had; and this not only in navigable rivers and armes of the ſea, but in creek

ports and havens, yea and in certain known limits in the open sea contiguous to the shore.

And these kinds of fishing are not only for small sea fish, as herrings, sprats, pilchers, &c. but for great fish, as salmons, which, though they are great fish, are not royal fish, as the report of Sir John Davies in the case of the fishing of Banne would intimate. And not only for smaller fish, and salmons, but even royal fish, as whale, sturgeon, porpoise, which, though they are royal fish, and *primâ facie* and of common right do belong to the king, yet a subject may prescribe even for these as appurtenant to his manor, as is unquestionably proved by our books.

besides, Now for precedents touching such rights of fishing in the sea and armes and creeks thereof belonging by usage to subjects, the most whereof will appear to be by reason of the propriety of the very water and soil wherein the fishing is, and some of them even within the ports of the sea.

P. 4. E. 1. B. R. Surrey.—The prior of Stoke brings trespass for the fishing in *aquâ de Sturmer* against Hamon Clever. The defendant justified, *quod piscavit in communi aquâ ipsius Hamonis ex parte comitatûs Suffolchiæ, ubi ipse et antecessores sui semper solebant piscare.*—The prior dicit, *quod Michael avus ipsius Hamonis dedit totum jus, quod dicebat se habere in piscariâ de le Sturmer Deo et sancto Johanni de Stoke, &c.*

P. 34. E. 1. B. R. Rot. 14. Kancia.—Prior de Coningshed placitat abbatem de Furneys pro prostratione gurgitis in *aquâ de Overstone*. The defendant justified; because each end of the weir was fastened upon the abbot's land. The abbot replies, *quod Willielmus de Lancaster dominus de Kendal dedit prædecessori suæ prædictæ aquam et piscariam ex utràque parte ejusdem fontum impetus maris fluit et refluit.*

Vide Rastall's Entries, trespass in piscary, pl. 4. Prescription pur severall fishing in *aquâ maritimâ fluente et resfluente in sonabili tempore cum 7 stallis separatis separalis piscariæ fixis propriis.*

P. 35. E. 1. B. R. Rot. 18. Suffolchiæ.—Willielmus Braham placitat Riccardum S. et 7 alios pro piscatione in separali piscariâ suâ apud Braham. Defendens dicit, *quod prædicta piscaria quoddam brachium maris et communis piscaria eorundem et aliorum, et non separalis piscaria. Ideo veniat jurata.*

Whereby it is admitted, though *primâ facie* an arm of the sea be in point of propriety the king's, and *primâ facie* it is common for every subject to fish there, yet a subject may have by usage a severall fishing there, exclusive of that common liberty which otherwise of common right belongs to all the king's subjects.

See Deo. 7 p. 2.

Precedents.

Prior of Stoke v. Cleaver B.R. 42.

Prior of Coningshed v. Abbot of Furneys B.R. 34.

Case in Rastall's Entr.

Braham ag. S. & 7 alios B.R. 35. L. 1.

*Case of Abbot
St. Benedict
Hulm B.
R. 10. E. 2.* Trin. 10. E. 2. B. R. Rot. 83. *Norfolchiæ.* The abbot of St. Benedict Hulm impleads divers for fishing in ripariâ, quod se extendit à ponte de Wroxam usque quandam lacum vocatam Blackdam.—Pending the suit the king's attorney came in, and acknowledged for the king, quod prædicta riparia est brachium maris quæ se extendit in falsum mare, et est riparia domini regis salisfluens et resfluens, ubi naves et battelli veniunt et applicant extra magnum mare carcati et discarcati quietè absque tolreto seu custum alicui dando, et est communis piscaria quibuscumque; et dicit, quod presentatum fuit in ultimo itinere coram Solomone de Roffa et sociis suis justiciariis itinerantibus in comitatu isto, quod prædecessor prædicti abbatis fecit purpresturam super dominum regem in ripariâ prædictâ, gurgites plantando in eadem et appropriando sibi prædictam piscariam tenendo tanquam separalem; per quod consideratum fuit, quod gurgites illæ amoverentur, et quod prædicta aqua remaneret communis piscaria. Et petit, quod non procedatur ad aliquam inquisitionem inde capiendam, quousque præfati justiciarii per recordo et processu prædictis certiores. Thereupon search is granted, and the record certified. And afterwards a præcedendo was obtained; and issue being joined, it was found for the abbot, and judgment and execution given against the defendants for the damages, viz. £.200.

Upon which record these things are observable.

1st. That *de communi jure* the right of such armes of the sea belongs to the king.

2d. That yet in such armes of the sea the subjects in general have *primâ facie* a common of fishing, as in the *maris* sea.

3d. That yet a subject may have a separate right of fishing, exclusive of the king and of the common right of the subject.

4th. That in this case the right of the abbot to have several fishing was not a bare right of liberty or *profit prendre*; but the right of the very water and soil itself, which he made weares in it.

*of Devon
case of the
port of Top
sham B.
R. 10. E. 1.* Escætria, 12. E. 1. n. 1. The earls of Devon had not only the port of Toppesham, *de quo infra*; but the record tells us, that *portus et piscaria et mariscus de Topsham spectant Amiciæ comitiſſæ Devon.*

*Abbot of
Tichfield
burghes
Southampton
R. 14. E. 1.* Mich. 13, 14. E. 1. B. R. rot. 10. The abbot of Tichfield impleaded the burghesses of Southampton, quod diripuerunt gregem suam apud Cadeland. *Burgenses* respondent, quod ipsa greges levata fuit ad nocumentum domini regis et villæ Southampton et quod batelli et naves impediuntur, quo minus venire non possint ad portum villæ prædictæ. Furatores dicunt, quod à tempore quo

Ec. non fuit ibi aliqua gurges, sed antiquitus solebant stare palii,

sed credunt, quòd tunc fuit prostrata gurges eadem occasione quàm
 modo, eo quòd fuit ad nocumentum transeuntium.

Upon which record these things are observable,

1st. That a subject may by prescription have a wear in the
 sea, and consequently have an interest below the low-water
 mark; for probably weares be such.

2dly, That, yet if it be a nuisance to the passage of ships,
 it may be abated.

7th Rep. 15. It appears, that the abbot of Abbotsbury be-
 fore dissolution had not only a game of swans, but the fishing,
 and the soil of an arm or creek of the sea called a meere or
 ete, in quam mare fluit et refluit; and it came to the king by
 the dissolution of the monastery.

And in many considerable armes of the sea that were naviga-
 ble rivers, and flowed and reflowed with salt water, divers
 persons had weares and local fishing sluices. As for instance,
 the river of Severn the earls of Lancaster had certain weares
 called Radley weares, part of his manor of Radley. Clause 10.

3. m. 29. The like for others in the river of Tese, Patentes
 E. 3. pars 1. m. 15. dorso in Twede, fines 2. E. 3. m. 1. in
 rent. Pat. 18. E. 2. pars 1. m. 3. dorso. Pat. 43. H. 3.
 dorso in Severn. Pat. 2. E. 4. pars 3. m. 15. dorso. Pat.
 E. 3. pars 2. m. 15. dorso in Ose. Pat. 12. E. 2. pars 1.

3.
 Trin. 50. E. 3. B. R. rot. 2. Essex. Walterius filius Wal-
 teri monstrat domino regi, quòd cum piscaria vocata le Reysund ab
 antiquo ut parcella manerij sui de Burnham appendebat, dominus
 per cartam suam eam concessit durante minore ætate suâ cuidam
 Bartholomeo Stigoune, qui prædictam piscariam detinet ad præju-
 rium et exhæredationem dictæ Walteri. And thereupon a scire
 was awarded. The defendant prayed aid of the king; and
 per a procedendo they plead to issue, and the jury find, that
 prædicta piscaria est parcella manerij prædicti. Ideo consideratum est,
 quòd prædicta piscaria, cum gurgitibus eidem pertinentibus, dicto
 Waltero liberentur.

Infinite more of this kind might be produced. I shall add no
 more here; but in the subsequent parts of this and the next
 chapter some other instances of this nature will occur, which
 are applicable to the prescription of the right of fishing in na-
 vable rivers; and I have added the more, because there are
 many glances and intimations in the case of the piscary of
 Tese, in Sir John Davies's reports, as if the fishing in these
 rivers of royal rivers, were not acquirable but by special char-
 ter, which is certainly untrue; for they are acquirable by pre-
 scription or usage, as well as royal fish may be.

*Abbot of
 Abbotsbury
 right of
 fishing
 in
 the
 sea
 called
 a meere
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 ete
 in
 7. Rep.*

*Instances
 as to weares
 & local
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 sluices.*

*Sir John
 Davies's
 doctrine
 as to
 fishing
 in
 royal
 rivers
 by
 prescription
 denied.*

It is true, that by the statute of *Magna Carta*, cap. 2. *Omnes kidelli deponantur de cetero penitus per Thamisham et Mawayam per totam Angliam, nisi per costeram maris.*

And this statute was seconded with others that were more effectual, viz. 25. E. 3. cap. 3. 1. H. 4. 12. 12. E. 3. cap. 7.

And by force of these statutes, weares, that were prejudicial to the passage of vessels, were to be pulled down; and accordingly it was done in many places. But that did no way disaffirm the propriety, but only remove the annoyance, which as before is shewn, was not to be allowed in an inland river, it be a common passage.

The exception of weares upon the sea-coasts, and likewise frequent examples, some whereof are before mentioned, make it appear, that there might be such private interests not only in point of liberty, but in point of propriety, on the sea-coast and below the low-water mark; for such were regularly weares. But as by the statutes of 25. E. 3. cap. 4.—45. E. 3. cap. 2.—1. H. 4. 12.—4. H. 4. cap. 11. and other statutes the erecting of new weares and inhancing of old is provided against in navigable rivers; and by other statutes particular provision is made against weares new or old erected in particular ports (as in the port of Newcastle, by the statute of the 1. H. 1. cap. 18.; in the port of Southampton, by the statutes 11. H. 7. cap. 5. 14. H. 8. cap. 13.; in the rivers of Ouse and Humber, by the statute of 23. H. 8. cap. 18.; in the river and port of Exeter, by the statute of 31. H. 8. cap. 4.; in the river of Thames, by the statutes of 4. H. 7. cap. 15. 27. H. 8. cap. 18. 5. Jac. cap. 20. and divers others); so by the statute of 3. Jac. cap. 12. all new weares erected upon the sea-shore or in any haven harbour or creek, or within five miles of the mouth of any haven or creek, are prohibited under a penalty. But in all these statutes, though they prohibit the thing, they do admit, that there may be such an interest lodged in the subject, not only in navigable rivers, but even in the ports of the sea itself contiguous to the shore, though below the low-water mark, whereby a subject may not only have a liberty but also a right or propriety of soil. But yet this, that I have said, must be taken with this allay, which I have in part premised.

1st. That this interest or right in the subject must be so qualified as it may not occasion a common annoyance to passage of ships or boats; for that is prohibited by the common law, and the several statutes before mentioned, viz. erecting new weares, inhancing old, fixing of pikes or stakes, and the like, in order to fishing: for the *jus privatum*, that is acquired to the subject either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or armes of the sea are affected to public use.

*Qualifications
to right
of weare.
2. as to
fishing.*

2d. That the fishing, that a subject hath in this or any other private or public river, or creek fresh or salt, is subject to the laws for the conservation of fish and fry, which are many.

And this gives me an occasion to divert to the examination of those commissions, that have been granted in common rivers, commonly called commissions of conservancy or water-bailiffs; which commissions have of late time especially been granted in the great rivers in England, and under which the patentees have exercised a jurisdiction irregularly enough and to the damage of the people, and under the disguise of a publick good have filled their own purses with the money exacted from the people. Therefore touching their office,

*Commons
river of
conservancy
by notice
& observed
upon*

1st. The office of a water-baillie or *scrutator* is a bare ministerial officer, which the king doth or may appoint in those rivers and places that are his in franchise or interest. And his business is, as to look to the king's rights, as his wrecks, his floatsan, water-strays, royal fishes. And he had no jurisdiction at all *quâ talis*; but his office was only ministerial, to receive and account for the casualties belonging to the king upon public great rivers, which did or in common presumption might belong to the crown. Such was that office of searcher, *scrutator*, bailie of the river of Severn *usque ad pontem Wigorniae*. Pat. H. 6. parte 2. m. 20. Pat. 8. E. 4. parte 1. m. 22.

2d. The office of conservator of rivers and fish in rivers; and these patents of conservancy we find mention in the statute. 1. R. cap. 17. And by a grant made to the city of London, and confirmed by the parliament of 17. R. 2. cap. 9. the conservancy of the river of Thames from Stainsbridge down to Medway is granted to the mayor of London.

This office of conservancy is of two kinds, or rather there are two may be two branches thereof.

1st. The conservancy in order to nuisances in rivers. This is grounded upon the statute of 1. H. 4. cap. 12, whereby it is enacted, that there shall be commissions granted to survey and keep the waters and great rivers, and to correct and amend the defaults. And this for Thames is annexed to the mayor of London also by the statutes of 4. H. 7. cap. 15. 27. H. 8. cap. 18.

3

2d. The conservancy in order to fishing. And this is that which is mentioned in the statute of 1. Eliz. cap. 17. And this is grounded upon the stat. of Westminster 2, cap. 47. which enacted, That the waters of Humber, Owse, Trent, Dove, Aire, Darwent, Wherf, Niddiore, Swale, Tese, Tyne, &c. *et omnes aliæ aquæ in regno, in quibus salmones capiuntur, ponantur*

cap. 22

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ponantur in defenso, &c. Et in partibus ubi hujusmodi ripari fuerint, assignentur conservatores istius statuti, qui ad hoc jura sæpius videant et inquirent de hujusmodi transgressoribus. Et primâ transgressione puniantur per combustionem retium, &c. By the stat. 13. R. 2. cap. 19. the former statute is confirmed and the river of Thames added; and the rivers of Lone, Wymerse and Ribbell, and all other waters in the county of Lancaster be put in defence as to the taking of salmons, &c. and in parts where such rivers are, there shall be assigned and sworn good and sufficient conservators of this statute, as of the statute of Westminster.

But neither of these statutes extended to any rivers but such wherein salmon be. And inasmuch as such a commission could not be without the warrant of an act of parliament, as is observed truly by my Lord Coke upon the statute of Westminster 2. cap. 47. consequently their commission cannot extend further than that act warrants, viz. to none but to those that are particularly named, or at least wherein salmon are.

By the statute of 17. R. 2. cap. 9. the justices of the peace are appointed conservators of these statutes, except only as to the conservancy of the river of Thames and Medway annexed to the mayor of London.

By the stat. of 1. Eliz. cap. 17. there is a farther and more extensive provision against the destruction of other fish as well as salmon; and it limits, that the lord admiral, the mayor of London, lords of leets, &c. and all other persons, &c. who by grant or other lawful ways or means lawfully have the conservation or preservation of any rivers, shall have power within the precincts of their lawful jurisdiction to inquire of, by the oaths of twelve men, and to hear and determine such offences.

This indeed doth enlarge the power of these conservators in respect of the offences, but not in respect of the limits of their jurisdiction.

Upon all this it follows,

1st. That these commissioners of conservancy have no power in reference to fishing, but in such places where salmons are in the rivers mentioned in the acts, though in those rivers they have jurisdiction as to other fish as well as salmon; and that the conservators have no power except in reference to nuisances in common or public rivers, and not in private nuisances between party and party.

2d. Consequently, not in the small rivers that fall into the rivers; for such small rivers as they, are not named in the acts of Westminster 2. nor 13. R. 2. and they have not authority over salmons in them, and so not within their jurisdiction.

3d. By

3d. But yet in those rivers particularly named in the statutes of Westminster 2. and 13. R. 2. or in such rivers where commons are, they have power to inquire of all offences contrary to the statute of 1. Eliz. because committed within the precinct of their jurisdiction.

4th. But then they must not convict nor fine men barely on a presentment without a tryall; for such conviction without tryall is against law in any case, but a leete or swan- and swan- court.

And therefore all those offences that are against the statute of Eliz. within small rivers, are only punishable by the leete, by the justices of the peace at their sessions, who are generally conservators by the statute of 17. R. 2. cap. 9. and not before these conservators by commission, except as to the offences in names, which are inquirable by the mayor of London.

And thus much by the way concerning conservatorships and water-baillies; and also concerning the right of fishing in the sea or armes thereof belonging to a subject, either by gift or prescription, either as a liberty or in respect of ownership of soil.

C A P. VI.

Concerning the ownership or propriety which a subject may have in the sea-shore and maritime increments, &c.

See before ch. IV. p. 10.

Come now to those other parts of propriety which a subject may have by prescription or usage, viz. the sea-shore and maritime increases; which, though we have before stated to belong *prima facie* to the king, yet they may belong to the subject in point of propriety, not only by charter or grant, but also by prescription.

The shoar of the sea.

There seem to be three sorts of shoars, or *littora marina*, according to the various tides, viz.

(1.) The high spring tides, which are the fluxes of the sea at the times that happen at the two equinoxials; and certainly these doth not *de jure communi* belong to the crown. For such high tides many times overflow ancient meadows and salt marshes, which yet unquestionably belong to the subject.

This is admitted of all hands.

(2d.) The

Three kinds of shore as Lordings variations (1.) High spring tides.

(2.) Spring
tides.

(2d.) The spring tides, which happen twice every month at full and change of the moon; and the shoar in question is in some opinion not denominated by these tides neither, but the lands overflowed with these fluxes ordinarily belong to the subject *primâ facie*, unless the king hath a prescription to the contrary. And the reason seems to be, because for the most part the lands covered with these fluxes are dry and maniorable; but at other tides the sea doth not cover them; and therefore touching these shoars some hold, that common right speaks for the subject, unless there be an usage to entitle the crown; for this is not properly *littus maris*. And therefore it hath been held that where the king makes his title to land as *littus maris*, *parcella littoris marini*, it is not sufficient for him to make it appear to be overflowed at spring tides of this kind. P. 8. *Car. in Camerâ Scaccarii*, in the case of Vanhesdanke for lands in Norfolk; and so I have heard it was held, P. 15. *Car. B.* Sir Edw. Heron's case, & Tr. 17. *Car. 2.* in the case of the lady Wandesford, for a town called the Cowes in the Isle of Wight, in *Scaccario*.

see in page
12. a reference
to these three
same cases.

(3.) Ordinary
or nepe
tides.

shore covered
by ordinary
flux of the
sea discovered
upon.

(3d.) Ordinary tides, or nepe tides, which happen between the full and change of the moon; and this is that which is properly *littus maris*, sometimes called *marettum*, sometimes *warettum*. And touching this kind of shoar, viz. that which is covered by the ordinary flux of the sea, is the business of our present enquiry.

1st. This may belong to a subject. The statute of 7. *J. cap. 18.* suppoeth it; for it provides, that those of Cornwall and Devon may fetch sea-sand for the bettering of their lands and shall not be hindered by those that have their lands adjoining to the sea-coasts, which appears by the statute they could not formerly. *Vide Cartæ Antiquæ D. D. n. 24.* the charter of Alan de Percey to the monks of Whitby, and the bounds thereof, viz. *tetam marinam à portâ de Whitby usque Bleasæ &c. et usque Terdiso, et usque in mare, et per marinam in Whitby* confirmed by king Henry I. And the bounds of that abbey's possessions take in many creeks of the sea, yet are given by subject, viz. Derwent, Muse, Eise, &c.

2d. It may not only belong to a subject in gross, who possibly may suppose a grant before time of memory, but may be parcell of a manor. And thus it is agreed 5. *Rep. 107.* in sir Henry Constable's case, and the book of 5. *E. 3.* cited accordingly. And according to this was the resolution cited Dyer 316. to be between Hammond and Digges, P. *Eliz.* And accordingly it was decreed in the Exchequer chamber, P. 16. *Car. inter l' Attorney Generall et sir Samuel Roll, sir Richard Buller, and sir Thomas Arundell, per*

bar

And the evidences to prove this fact are commonly
 se; constant and usual fetching gravel and sea-weed and sea-
 and between the high-water and low-water mark, and licensing
 ers so to do; inclosing and imbanking against the sea, and
 enjoyment of what is so inned; enjoyment of wrecks hap-
 ping upon the sand; presentment and punishment of pur-
 estures there in the court of a manor; and such like.
 And as it may be parcell of a manor, so it may be parcell of
 will or parish; and the evidence for that will be usuall pe-
 nibulations, common reputation, known metes and divisions,
 and the like. And upon this account the parson of Sutton
 out 14. Car. had a verdict for the tithes of Sutton-Marsh in
 Lincolnshire, upon a long and a great evidence; though it
 appeared, that within time of memory it was the meer shoar
 the sea covered at ordinary tides, and without the old sea-
 ank.

It may not only be parcell of a manor, but *de facto* it
 any times is so; and perchance it is parcell almost of all such
 manors as by prescription have royal fish or wrecks of the sea
 within their manor. For, for the most part, wrecks and
 royal fish are not, nor indeed cannot be well left above the
 high-water mark, unless it be at such extraordinary tides as
 overflow the land: but these are perquisites, which happen
 between the high-water and low-water mark; for the sea
 withdrawing at the ebb leaves the wrecks upon the shoar, and
 those greater fish which come under the denomination of
 royal fish. He therefore that hath wreck of the sea or royal fish
 by prescription *infra manerium*, it is a great presumption, that
 the shoar is part of the manor, as otherwise he could not have
 it. And consonant to this is the pleading of Sir Henry
 Grevill's case, 5. E. 3. 3. and Rastall's Entries 684. transcrib-
 ed out of the record *M. 14. E. 1. Rot. 432.* where an abbot,
 describing for wreck belonging to his manor, doth it in this
 manner: *Ipseque et omnes prædecessores sui abbates monasterii præ-*
dicti et domini ejusdem manerii, per totum tempus prædictum, ha-
verunt, et habere consueverunt, ratione manerii prædicti, omni-
bus bona wreccata super mare et ut wreccum super terram pro-
super costeram maris in quodam loco ubi mare secundum cursum
pro tempore fluxit et refluxit, à quodam loco vocato M. in pa-
ria de L. &c. And in the following plea, an abbot prescribes
 have *wreccum maris infra præcinctum manerii sive dominii sui*
dictum et flotesan maris infra præcinctum manerii deveniens,
et prædictum dolium vini fuit wreccum maris per mare pro-
um super littus maris apud S. infra præcinctum manerii sive
manerii illius.

And

And with this agrees the Register 102. Yet I find the
of Cornwall had *wreccum maris per comitatum Cornubiæ*;
thereupon being questioned for wreck, adjudged, *quod eat*
die. P. 14. E. 1. minus B. R. Rot. 6. Cornubia. But
was in a contest between the king and him; for possibly
inferior lords might have it by usage against the earl.

Thus much shall suffice concerning the shoar or space
tween the high-water and low-water mark, which may be
to a subject and be parcell of his manor.

II. Let us now come to the *maritima incrementa*, viz.

Alluvio maris;
Recessus maris; et
Insula maris.

*Maritima incrementa
discursum
uppon.*

(1.) As to Alluvio maris.

(1st.) For the *jus alluvionis*, which is an increase of
land adjoining by the projection of the sea casting up and add
sand and slubb to the adjoining land, whereby it is increa
and for the most part by insensible degrees, Bracton, lib.
cap. 2. writes thus: *Item quod per alluvionem agro tuo flu*
adjecit, jure gentium tibi acquiritur. Est autem alluvio latens
crementum. Et per alluvionem adjici dicitur, quod ita paul
adjicitur, quod intelligere non possis quo momento temporis adjici
Ec. Si autem non sit latens incrementum, contrarium erit, ut
fluminis partem aliquam ex tuo prædio detraxit, et vicini præ
appulit, certum est eam tuum permanere, Ec. But Bracton
follows the civil law in this and some other following plac
And yet even according to this, the common law doth reg
larly hold at this day between party and party. But it
doubted in case of an arm of the sea, 22. Aff. 93.

This *jus alluvionis*, as I have before said, is *de jure commu*
by the law of England the king's, viz. if by any marks
measures it can be known what is so gained; for if the gain
so insensible and indiscernible by any limits or marks tha
cannot be known, *idem est non esse et non apparere*, as well
maritime increases as in the increases by inland rivers.

But yet custom may in this case give this *jus alluvionis* to
land whereunto it accrues.

This is made out very plainly by these ensuing records.

Communia Trin. 43. E. 3. Rot. 13. in Scaccario, which is t
very record which is cited by Dyer 326. out of the book
Ramsey.—Process went out against the abbot of Ramsey
ostendendam causam, quare 60 acrae marisci in manum regis
debent sefiri, quas abbas appropriavit sibi et domui suæ sine lic
regis, super quâdam generali commissione de terris à rege conce
et detentis. Abbas respondit, quod ipse tenet manerium de Br

*Abbot of Ramsey
in Scaccario
Trin. 43. E. 3.*

find the
r, quod scituatur est juxta mare, et quod est ibidem quidam
r, qui aliquando per in fluxus maris minoratur, aliquando
refluxus maris augetur, absque hoc quod appropriavit sibi prout
presentationem prædictam supponitur. And issue joined and
dict given for the abbot by Nisi prius before one of the ba-
Et judicium quod eat sine die, salvo semper jure regis.
though there were a verdict upon the issue, whether appro-
vit or not, yet it is plain, that the title stood upon that
ch the abbot alledged by way of increment. And note,
is no custom at all alledged; but it seems he relied upon
common right of his case, as that he suffered the loss so
ould enjoy the benefit, even by the bare common law in
of alluvion.

M. 23. E. 3. B. R. Rot. 26. Lincolnia.—The abbot of Pe-
brough was questioned at the king's suit for acquiring 30
marisci in Gosberkile, licentiâ regis non obtentâ. The abbot
ted, quod per consuetudinem patriæ est et à tempore quo, &c.
it usurpatum, quod omnes et singuli domini, maneria terras
tenementa super costeram maris habentes, particulariter habebunt
ttum et sabulonem per fluxus et refluxus maris secundum majus
inus prope tenementa sua projecta. Et dicit, quod ipse habet
dam manerium in eadem villâ, unde plures terræ sunt adja-
m costeræ maris, et sic habet per fluxus et refluxus maris circiter
lacras maretta terras suas adjacentes, et per temporis incremen-
secundum patriæ consuetudinem; et absque hoc quod ipse per-
vit, &c. And upon issue joined, it depended many years
re the issue was tried. But afterwards, P. 41. E. 3.
R. Rot. 28. Lincolnia, Rex. viz. given, quod, secundum
etudinem patriæ, domini maneriorum prope mare adjacentium,
unt maretum et sabulonem per fluxus et refluxus maris per
ris incrementum ad terras suas costeræ maris adjacentes pro-
&c. Ideo abbas sine die.

Observe,
Here is custom laid, and he relies not barely upon the
without it.

In this case it was per incrementum temporis and per mare
It is not a sudden reliction or recessus maris, as I shall
occasion to mention hereafter. And though there is no
without some kind of reliction, for the sea shuts out
; yet the denomination is taken from that which pre-
inates. It is an acquett per projectionem or alluvionem, not
cessum or relictionem.

That such an acquisition lies in custom and prescrip-
and it hath a reasonable intendment, because these secret
gradual increases of the land adjoining cedunt solò tanquam
principali; and so by custom it becomes as a perquisite to
and, as it doth in all cases of this nature by the civil law.

2. Now

Abbot of
Peborough
case B.R.
27. E. 3.
Miri case
ag. & respons.
to port. 37.

(2.) *As to
recessus
maris.*

(2.) Now as touching the accession of land *per recessum* maris or a sudden retreat of the sea, such there have been in times of ages. Sometimes the ocean, especially the narrow sea between us and France and the Netherlands, leaves the English shore in a great considerable measure; possibly by reason of some superundation on the other eastern shore, or by some other reason we know not.

This accession of land, in this eminent and sudden manner by the recess of the sea, doth not come under the former title of *alluvio*, or increase *per projectionem*; and therefore, in case of information of an intrusion be laid for so much land *relictum mare*, it is no good defence against the king to make title *consuetudinem patriæ* to the *marettum*, or *sabulonem per mare relictum*; for it is an acquist of another nature. And this was accordingly adjudged, *H. 12. Car. Rot. 48.* in the case of the king against Oldsworth and others for Sutton Marsh, in *Sutton Marsh*. And in that case it was likewise held and adjudged, that lands acquired *per relictionem maris* are not prescribable, as part of a manor or as belonging to the subject; for that would be to prescribe, in effect, that the narrow seas to the coast of France or Denmark were part of a manor. In that case the information plea and judgment were in substance as following, viz.

Quod cum 7000 acrae marisci salsi vocati Sutton Marsh, jacentes et existentes juxta Sutton Long in comitatu prædicto, videlicet, Sutton Long et mare ad refluxum ejusdem, fuissent parcella littoris marini, ac ad refluxus maris naturalis et ordinarios aquis salis marinis inundatæ: cumque eadem 7000 acrae marisci salsi nuper per mare, unde inundatæ fuissent, fuissent relictæ. Then the information sets forth a grant by king James under the great seal to Peter Ashton and others, and a regrant by them by deed inrolled to the king, and that Michael Oldsworth, &c. intruded into the said lands. The defendant Oldsworth came in; and as to part pleaded as tenant, viz. quod bene et verum est, quod prædictæ 7000 acrae marisci salsi vocati Sutton Marsh, jacentes et existentes juxta Sutton Long, viz. inter Sutton Long et mare ad refluxum ejusdem, fuissent parcella littoris marini, et ad refluxus maris naturales et ordinarios aquis salis inundatæ et à mari relictæ prout per informationem prædictam est et à tempore quo, &c. quod domini maneriorum, terrarum, tenementorum super costeram maris adjacentium, particulariter habebunt marettum et sabulonem per fluxum et refluxum maris secundum majus et minus prope terras seu tenementa sua projectum relictum: quodque et prædictæ 7000 acrae marisci salsi ad tenementum

*Case of
the King
v. Oldsworth
& others for
Sutton Marsh
in case of
12. Cha. 1.
See a former
notice of this
case page 14.
Mr. Bridg-
man's Mss.
Report of
the case here
noticed by
me in the
margin
there.*

recessus maris et per fluxus et refluxus maris relicta fuerunt à mari, et projecta ad terram prædictam parcellam manerii de Sutton prædicti, ratione cujus relictio prædicta dominus rex fuit seiscitus, &c. de prædictis 7000 aris in jure ducatus, &c. And then he entitles himself by a grant under the duchy seal, and traverseth what he had not confessed. Upon this there was a demurrer and judgment for the king, upon solemn argument; and principally upon this reason, that custom cannot intitle the subject to relict lands, therefore, it make it part of a manor: and it differed from the case of the abbot of Peterborough before cited; for there it was only a relict, but here relict is added to the plea, that it might answer the information; though the plea in the abbot of Peterborough's case was the precedent by which the plea was drawn, and with which it agreed, saving that addition of relict. And yet the true reason of it is, because the soil under the water must needs be of the same propriety as it is when it is covered with water. If the soil of the sea, while it is covered with water, be the king's, it cannot become the subject's because the water hath left it. But in the case of *alluvio maris*, it is otherwise; because the accession and addition of the land by the sea to the dry land gradually is a kind of perquisite, and an accession to the land; and therefore, in case of private rivers, it seems by the very course of the common law, such a gradual increase *cedit solo adjacenti*; and though it may be doubtful whether it be so *ex jure communi* in case of the king, yet doubtless it gives a reasonableness and facility for such right of *alluvio* to be acquired by custom; for though in every acquiescence there be a relaxation or rather exclusion of the sea, it is not a recess of the sea, nor properly a reliction. But this is to be carried along with us in the case of *recessus maris vel brachii ejusdem*; that where the land, as it is covered with water, did by particular usage or prescription belong to a subject, there the *recessus maris*, so far as the subject's particular interest went while it was covered with water, so far the *recessus maris vel brachii ejusdem* belongs to the subject.

The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath that propriety in the sea: but a subject hath not nor indeed cannot have that property in the sea, through a whole tract of it, that the king hath; because without a regular power he cannot possibly possess it. But though a subject cannot acquire the interest of the narrow seas, he may by usage and prescription acquire an interest in so much of the sea as he may reasonably possess, viz. of a *districtus*

districtus maris, a place in the sea between such points, or particular part contiguous to the shore, or of a port or creek or arm of the sea. These may be possessed by a subject, as prescribed in point of interest both of the water, and the soil itself covered with the water within such a precinct; for these are maniorable, and may be entirely possessed by a subject.

The civilians tell us truly, *nihil præscribitur nisi quod possidetur*. The king may prescribe the propriety of the narrow sea, because he may possess them by his navies and power. A subject cannot. But a subject may possess a navigable river, creek or arm of the sea; because these may lie within the extent of his possession and acquett.

The consequence of this is; that the soil relinquished by such armes of the sea, ports, or creeks; nay, though the soil should be wholly dried or stopped up; yet such soil would belong to the owner or proprietor of that arm of the sea, or river or creek: for here is not any new acquett by the reliction, but the soil covered with water was the subject's before, and also the water itself that covered it; and it is so now that it is dried up, or hath relinquished his channel or part of it.

And such an acquett of a propriety in an arm or creek of the sea may be as well within the precinct of a port, as without, and that, though the king or some other subject hath the port in point of franchise or privilege. For though the soil of creeks and navigable rivers, especially within ports, do *pro facie* belong to the king in point of propriety as well as in point of franchise, yet the subject may have so great and clear a possession of the soil lying under the water of that port, that it may belong to a subject in point of interest or propriety of the soil, though he have or have not the port in point of franchise, and consequently, if the sea should relinquish the channel of a creek or arm of the sea within such a port, it might and would belong to that subject, that had the propriety of the soil and water before it were so relicted.

And this is an exception out of that generality, possibly, that *terra relictæ per mare* may not be prescribed. But a creek, arm of the sea, or *districtus maris*, may be prescribed in point of interest; and, by way of consequence or consequence, the land relicted there, according to the extent of such a precinct as was so prescribed, will belong to the former owner of such *districtus maris*. But otherwise it would be, if such prescription before the reliction extended only to a liberty or *profit appendre*, or jurisdiction only within that precinct; liberty of free fishing, admirall jurisdiction, or the jurisdiction of a leet or hundred or other court; for such may extend

points, or an arm of the sea, as appears by 8. E. 2. *Corone*; for these not any acquests of the interest of the water and soil, but take it as it found it.

Therefore the discovery of the extent of the prescription or right, whether it extend to the soil or not, rests upon such evidences of fact as may justly satisfy the court and jury concerning the interest of the soil.

That which I have to say concerning creeks or havens or armes of the sea, and the propriety of them, will be contained in these following assertions.

1. That a subject may, by usage or prescription, be owner or proprietor of such an arm of the sea, creek, or particular portion of the sea contiguous to the shore, as is not a public port or haven; and consequently, if that part be left dry *per rem vel obstructionem maris*, that will belong to that subject, that he had antecedent propriety when it was covered with water.

This will appear by the review of those cases that are in the precedent chapter concerning the right of fishing in the sea, many of which instances make it appear, that there may be a right of propriety in the soil *aquâ coopertâ*, and the right of fishing resulting not as a *profit appendre*, but upon the very soil of the soil itself. And those instances, that follow in this chapter, will farther make out the propriety of the soil of such places as these compatible to a subject.

2. That a subject having a port of the sea may have, and is in common experience and presumption hath, the very soil covered with the water; for though it is true, the franchise of a port is a differing thing from the propriety of the soil of a port, and so the franchise of a port may be in a subject, and the propriety of the soil may be in the king or in some other, yet in many usages and presumptions they go together.

3. That the king at this day grant *portum maris de S.* the king having the port in point of interest as well as in point of franchise, may be doubtfull, whether at this day it carries the soil, or only the franchise; because it is not to be taken by implication. Surely, if it were an ancient grant, and usage had gone along with it, that the grantee held also the soil, this grant might be usual to pass both; for both are included in it.

4. So if by prescription or custom a man hath *portum maris* in ordinary presumption he hath not only the franchise, but the very water and soil within the port; for a *portus maris* is an *aggregatum*, as a manor; and such a prescription may carry both as well as the franchise; and though this doth not always yet most times it doth.

5. *Portus et piscaria et mariscus de Topplestant ad Amiciam comitissam Devon.* She had not only the franchise of the port, but the soil of the port, and the fishing and marsh adjoining. *Vide infra*, when we come to the rights of

See page
56.

And *vide infra*, par. 2. cap. 4. the case of the port of mouth, parcell of the manor of Trematon, wherein it will appear, that a subject, as he may be owner of a port in point of franchise, so he may be owner of the very soil of the haven point of propriety. And see in the same chapter concerning port of Poole. The earl of Surrey was owner of it in point of propriety as well as franchise, and had the anchorage of the there, which seems to be ordinarily a perquisite in respect to soil.

3d, That a man who is not owner of a port in point of franchise, but the franchise of the port belonging to the king; such a subject may by usage have the very propriety of a port or arm of the sea parcell of that port, and of the soil thereof; and may have upon that account the increases of land that happen to the recess of the water of that arm of the sea.

Case of
Prior of
Christ
Church
Canterbury
in Reg. 252.

Register, 252. The prior of Christ Church Cantuarie presents the king, *quod cum quædam antiqua trenchea, quæ sita à brachio maris vocata A. versus villam de B. quæ est in ipsorum prioris et conventus, per sabulones et arenam maris jam nova taliter sit obstructa, quod naues per trencheam illam usque dictam villam de B. venire nequeunt, ut solebant; et quædam trenchea, ducens ab eodem brachio maris usque ad eandem villam de B. jam vi maritimâ facta existet, per quam naues et bataria mari usque ad villam illam commodè et sine impedimento poterant transire. An ad quod damnum issues to inquire, si sit ad damnum vel præjudicium nostri aut aliorum, seu nocumentum villæ de B. si eis licentiam concedamus, quod ipsi dictam antiquam trencheam omnino obstruere et commodum suum inde facere possint.*

Here the common passage for ships to a town admitted point of propriety to belong to the prior, and that they may make profit of the soil being stopt up.

Case in
Seacarrion
Car. 1. on infor-
mation
mat. & pro-
cessed by
Sir Sackville
Crow v.
Smith the farmer
of Lord's par-
cel, 1664

In *Seaccario Car. 1.* upon the prosecution of Sir Sackville Crow, there was an information against Mr. John Smith, farmer of the lord Barclay, setting forth, that the river of Sever was an arm of the sea, flowing and reflowing with salt water, and was part of the ports of Gloucester and Bristol, and that the river had left about 300 acres of ground near Shinbridge, therefore they belonged to the king by his prerogative.

Upon not guilty pleaded, the tryall was at the exchequer by a very substantial jury of gentry and others of great value. Upon the evidence it did appear by unquestionable proof that Severn in the place in question was an arm of the sea, flowed and reflowed with salt water, was within and part of the ports of Bristol and Gloucester, and that within time of memory these were lands newly gained and inned from the sea, and that the very channell of the river did within time of memory run in that very place where the land in question lies; and

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Severn had deserted it, and the channell did then run above
ile towards the west.

On the other side, the defendant claiming under the title of
lord Barclay alledged these matters, whereupon to ground
defence, viz.

1. That the barons of Barclay were from the time of Henry
second owners of the great manor of Barclay.

2. That the river of the Severn *usque filum aquæ* was time
of memory parcell of that manor.

3. That by the constant custom of that country, the *filum*
of the river of Severn was the common boundary of the
ors on either side of the river.

When this statute of the evidence was opened, it was insist-
upon, that the river in question was an arm of the sea, a
river, and a member of the king's port, and therefore lay
in prescription to be part of a manor. But the court over-
that exception; and admitted, that even such a river,
gh it be the king's in point of interest *primâ facie*, yet it
be by prescription and usage time out of mind parcell of a
or.

Thereupon the defendant went to his proofs, and insisted upon
many badges of property or ownership; as, namely,
that the lords of the manors adjacent to this river, and par-
ticularly those of that manor, had all royal fish taken within the
opposite to their manor *usque filum aquæ*:

That they had the sole right of salmon fishing:
That they had all wrecks cast between high-water and low-
er mark:

That the lords of the manors adjacent had ancient rocks or
ng-places, and weares, or such as were of that nature,
in the very channell:

That they had from time to time granted these fishing-places,
by lease, some by copy of court roll at their several ma-
by the names of rocks, weares, staches, boraches, putts;
that they were constantly enjoyed, and rent paid by those
holders and lease-holders:

That by common tradition and reputation, the manors on
er side Severn were bounded one against another by the *filum*
and divers ancient depositions produced, wherein it was
rdingly sworn by very many ancient witnesses:

That the increases happening by the reliction of the river
constantly enjoyed by the lords adjacent.

These and many other badges were opened, and were most
tually made good by most authentical evidences and wit-
s. But before the defendant had gone through one-half
evidence, the court and the king's attorney-generall fir

John Banks, and the rest of the king's counsell, were so satisfied with the defendant's title, that they moved the defence to consent to withdraw a juror, which though he were very willing, yet at the earnest desire of the court and the counsell he did agree thereunto.

So that matter rested in peace, and the lands, being of yearly value of two hundred pounds and better, are enjoyed by the lord Barclay and his farmers quietly and without the pretence of question to this day. This I know; for I was thoroughly acquainted with this case, and attended at the trial.

This great and solemn tryall for the right of a royall river and part of it, doth fully prove that which I have said touching this matter.

*Two
Cautions
as to propriety
of a river
- River having
property of
a publick
river part
of a port.*

But though the subject may thus have the propriety of a navigable river part of a port, yet these cautions are to be added, 1st. That the king hath yet a right of empire or government over it, in reference to the safety of the kingdom and to his towns, it being a member of a port; *prout inferius dicetur.*

2d. That the people have a publick interest, a *jus publicum* of passage and repassage with their goods by water, and not be obstructed by nuisances or impeached by exactions shall be shewn when we come to consider of ports. For *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects as the soil of an highway is, which though in point of propriety it may be a private man's freehold, yet it is charged with a publick interest of the people, which may not be prejudiced or diminished.

*(3d.) As to
islands, arising
- being in sea
or arms
or creeks
or havens.*

(3d.) As touching islands arising in the sea, or in the arms or creeks or havens thereof, the same rule holds, which is before observed touching acquiescence by the reliction or receipt of the sea, or such armes or creeks thereof. Of common right *prima facie*, it is true, they belong to the crown, but the interest of such *districtus maris*, or arm of the sea or haven, doth in point of propriety belong to a subject, by charter or prescription, the islands that happen within the precincts of such private propriety of a subject, will belong to the subject according to the limits and extents of such propriety. And therefore if the west side of such an arm of the sea belong to a manor of the west side, and an island happen to arise on the west side of the *filum aquae* invironed with the water, the propriety of such island will entirely belong to the lord of the manor of the west side; and if the east side of such an arm of the sea belong to a manor of the east side *usque filum aquae*, and an island happen between the east side of the river and the *aqua*, it will belong to the lord on the east side; and

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... divide itself, and one part take the east and the other west, and leave an island in the middle between both the *fila*, one half will belong to the one lord, and the other to the other. This is to be understood of islands that are newly made; for part of an arm of the sea by a new recess from his ancient channel encompass the land of another man, his propriety continues unaltered. And with these diversities agrees the law at this day, and Bracton, *lib. 2. cap. 2.* and the very texts of the law. *Vide Digest. lib. 41. de acquirendo rerum dominio, l. 7, 12, 41, 29, 30, 38, 50, 56, 65. et ibidem, lib. 43. l. 12. de fluminibus, l. 1. § 6. Vide Bracton ubi supra. Habet enim locum hæc species accessionis in insula nata in flumine, quæ, si unam partem fluminis teneat, communis eorum est, qui proinde ab utraque parte fluminis prope ripam prædia possident, &c.* the propriety of such a new accrued island follows the propriety of the soil, before it came to be produced. And thus much shall suffice to have been said concerning these *rementa maritima*, and how they may in point of propriety belong to a subject. It remains, that a few words be said touching the other prerogatives, that have a cognation with this matter are about, viz.

Wreck of the Sea; and
Royal Fishes;

which shall be the business of the next chapter.

C A P. VII.

Concerning the prerogative and franchise of wreck and its kinds, and royal fish.

Touching wreck of the sea, in the first place, it is sometimes called *wreccum maris*, sometimes *warettum*, which sometimes in records applied to the accession of lands by alluvion. The record of the abbot of Peterborough, cited in the next chapter, is, *domini habuerunt warettum et sabulonem*. Though I have used the word *warettum*, in the old French it is called wreck, and sometimes *varsch*.

The kinds of it are two, viz.

1. Such as is called properly so, the goods cast upon the land or shore.

2. Improper for goods that are a kind of sea-waifs or stray, *son, jetson, and lagon*.—Of both these briefly.

Touching wreck of the sea. It is not properly wreck, till it be cast upon the shore or land; and therefore by the statute of 15.

R. 2.

see p. 29.

R. 2. cap. 3. wreck of the sea is declared to be determinable by laws of the land, and not before the admirall in any wise; and was one of the articles anciently within the inquiry and jurisdiction of the coroner. *Vide stat. 4. E. 1. officium coronatoris*, concerning wreck of the sea, wheresoever found; and if any hands on it he shall be attached by sufficient pledges, and the value of the wreck shall be valued and delivered to the towns. This power was annexed to the coroner by the statute of 3. E. 1. called Westminster 1. And therefore as long as the goods floating upon the sea, they are not wreck; and according to resolution 5. Reports, sir Henry Constable's case.

But all goods cast upon the shore are not therefore wrecked so as to intitle the king or lord of a liberty to them; it must have these qualities, viz.

1st. It must be such goods or ship that is wrecked or perished at sea. For if the goods were taken by pirates, and then come or be brought or left upon English ground by any means they are not wreck to be forfeit, but provision is made for restitution to the merchant by the statute of 27. E. 3. cap. 13. Upon this account it seems, that resolution of the judges is grounded, which is cited in the comment upon Westminster 1. cap. 1. viz. that if enemies or pirates take a ship, and take out all passengers and goods, and turn the hull to the sea, and it is upon the land, though no living thing come in her, she is wrecked so as to give the forfeiture. Yet though the law was not such, the case, that is cited, warrants it not, which is *Clayton's case*, R. 2. m. 24.; for there the mariners got all to land in Norway in the long-boat, and left the ship to the enemies, and so was the following rule.

2d. Though the ship or goods be wrecked and cast upon shore, yet if any living thing escape alive to land out of the ship it is not such a wreck as gives a forfeiture. And this was an ancient law before the statute of Westminster 1. cap. 4. resolved and made evident by the resolution of Constable's case *ubi supra*, and the lord Coke's comment upon that statute: though the common law give the king *bona wreccata*, as shall be shewn; yet, because it was *lex odiosa* to add affliction to the afflicted, it was bound up with as many limits and circumstances, and to as narrow a compass as might be.

3d. That these goods be cast upon the shore or land, and brought thither in a ship or vessel. *Vide inter placita* Gerley's case, 3. E. 2. A ship was broken at sea; and the goods floating in the high sea, certain mariners took them up and put them on board, and they came with their ship into the land of Gloucestershire, where they were seized by the sheriff of Chirbury, who by charter had wreck of the sea; and before the vessel went to the shore of the abbot of Chirbury.

*Case of
wreck betw.
Geffrey Cote
- red & black
of Chirbury
B. E. 2. a Jersey case.*

had likewise wreck. The goods being seized by the king's officer, these two interpleaded for the goods as wreck.

Et Willielmus le Mareis, qui sequitur pro domino rege, dicit, nullus eorum petere possit bona prædicta ut wreccum; quia dicit, ea tantummodo sunt wreccum, quæ fluctus maris projiciunt ad terram, vel infra portum, aut tam prope terram, quod à stantibus terræ possunt perpendi, et sic ducantur vel trahantur ad portum; quæ reperta sunt in alto mari, unde certum non existit, quod fluctus maris ea vellent projicere, si non per laborem marinellorum tantum à mari, et ponantur in navi vel batello, et sic in vasa trahantur ad terram et non tangunt terram alicujus pertrahentium, nec modo non possunt dici wreccum, sed tantummodo de adventuriis, de quibus nullus potest aliquid clamare, nisi salvatores et unus rex, vel ille, cui rex concesserit libertatem percipiendi hujusmodi aventuras. Et petit judicium pro domino rege, et prædicti, non dedicare possunt. Consideratum est, quod prædicta vina maneat domino regi, et prædicti Petrus et alij in misericordia falso clamore. Postea prædicta vina de prædictis doliis condempnata sunt prædicto priori pro 60s. de quibus solvit prædictis salvatoribus 40s. pro parte suâ, et de 20s. residuis respondet regi.

This, though it were a proceeding in Gerley, who were here before and yet are guided by the customs of Normandy, yet even these customs as to the point of wreck are very near if not altogether the same with those of England, as appears by the 17th chapter of the *Grand Custumier, de Varench*. And this resolution above cited is consonant to that of sir Henry Constable's case, 5. reports, though differing in terms and names.

And thus much of the nature of wreck, and this by the laws of England is forfeit; and the propriety of the first owner is, by the seizure of the king, or his officer, or lord of the liberty having his jurisdiction, wholly divested.

But if goods are cast upon the shore, though they have not all these properties, they may be seized by the king, or the lord that has the liberty of wreck, and lawfully detained, till the right owner come and claim them, and make it appear that they are his; and the common law allowed him a year and a day for the recovering his claim. And therefore as to this also the statute of Westminster 1. cap. 4. was but an affirmance of the common law, as it seems; for the very same time is allowed for the claim of goods so seized by the *Custumier* of Normandy.

And the time, from whence the day and the year is to be computed, is from the time of the seizure, as appears by the comment upon that statute; and if not claimed within that time, they are lost.

But

But if there were a seizure by persons that had no right to seize, the elapse of the year and the day, as it is conceived, does not bar the right owners.

The statute of the 27. Ed. 3. cap. 13. provides more explication for the restitution of the merchant, where the goods are lawful wreck; but it seems the generality of that statute takes not away the loss of the goods by non-claim by a year and a day after seizure.

35. H. 6. 27. If goods of a common person be seized as wreck, if he claim not in a year and day, they are lost; but if the king's goods were wrecked, he need not claim.

And *nota*, this claim is available only where the goods are upon the shore, but they are not a legal wreck, as perchance some living thing escaped to the land. But where the goods are a legal wreck, this claim signifies nothing; for the goods are *facto* forfeit by being wreck and seized; for the provision of the statute of 3. E. 1. as to the claim and proof within the year and day refers only to such goods as are cast upon the shore, but not lawful wreck.

But yet in such case, where the goods are not wreck in law, the merchant must allow salvage, or the charge that the taking of the goods is at for their saving. Pat. 14. E. 4. m. 12. *donec*.

Thus much for the nature of wreck. Now concerning the propriety of it.

The statute of *Prerogativa Regis*, cap. 11. tells us to what wreck doth of common right belong in England. *Rex habet wreckum maris per totum regnum, balenas et sturiones captas in mari vel alibi infra regnum, exceptis quibusdam privilegiatis locis per regem.*

This was the common law before this statute; and this statute as to this point, and most if not all other points of prerogative in that statute called *Prerogativa Regis*, is but declarative of the common law, and rather a repetition or collection of the king's prerogatives than any enacting law.

And the same was the prerogative of the duchy of Normandy as appears in the *Grand Customier*, cap. de *Varech*.

See Spelman in *Glossario*, title *wreck*, several charters mentioned by king William the first, yea and by Edward the Confessor of *wreck* and *jaçtura maris*.

King R. 1. in the second year of his reign released wreck through all England, as the same author cites it out of Hoveden. But his successors resumed the prerogative again, and that by the statute of 17. E. 2. called *Prerogativa Regis*; and frequent instances thereof are long before that statute in the times of Edward H. 3. and king John.

no right But though wreck of the sea doth *de jure communi* belong to the king, yet it may belong to a subject.

1st. By charter; and this is without question.

2d. By prescription; and although this was doubted in the case of Bracton, yet the law is settled and unquestionable at this day.

Sometime wreck hath belonged to an honour by prescription; as to the honour of Arundel, though the *caput baroniae* were in the county of Suffex; being another county from the place where the wreck arose. *T. 9. E. 1. B. R. Rot. 20. Effex.*

Sometime to the owner of a county. The lords of all counties palatines regularly had *wreccum maris* within their counties palatines, as part of their *jura regalia*. But yet inferior lords might prescribe for wreck belonging to their severall manors within a county palatine. The earl of Cornwall, which though it were not a county palatine it had many royalties belonging to it, had *wreccum maris per totum comitatum Cornubiæ*, viz. against the king, though particular lords might prescribe for wreck against the earl. *P. 14. E. 1. B. R. Rot. 6. & 29. Cornubiæ.*

And thus much concerning wreck, and the right of it.

III. Somewhat is fit to be mentioned concerning *flotson, jetson, and lagon*.

These are not wreck of the sea, but of another nature; neither do they pass by the grant of *wreccum maris*, as is resolved in that case of sir Henry Constable, and the case of the 3 E. 2: *Rex habet* where they are stiled *adventuræ maris*.

And as they are of another nature, so they are of another cognizance or jurisdiction, viz. the admirall jurisdiction.

The right of *flotson, jetson, and lagon*, and other sea-staves, if they are taken up in the wide ocean, they belong to the taker of them, if the owner cannot be known.

But if they be taken up within the narrow seas, that do belong to the king, or in any haven port or creek or arm of the sea, they do *prima facie* and of common right belong to the king, where the ship periseth, or the owner cannot be known; which is also one of the resolutions of sir Henry Constable's case. If the owner can be known, he ought to have his goods restored; for the casting them overboard is not a loss of his property.

Although the right of these adventures of the sea within the narrow seas belongs to him, where the owner cannot be known, yet the king hath little advantage of it; for by the custom of the English seas, the one moiety of what is so gained belongs to him that saves it. And accordingly the custom is recited in a charter by the king of England to the French king, *Glaus. 7. E. 3.*

parte

Wreck may belong to subject by prescription

2d. Rot.

same case as before ant. 2d.

parte 1. membrana 23. dorso, to satisfy him of the usage, that the merchants goods, that are floating in the sea, be saved though the merchant made out his property, yet the goods were usually divided, the one moiety to the merchant, and the other moiety to them that save them for salvage. But it seems by the statute of 27. E. 3. cap. 13. that hard custom was mitigated to the merchant; and a reasonable amends allowed for salvage according to the expence pains or adventure of them that save it. But whether any thing hath altered that custom as to wreck, I find not.

The other moiety of these *bona vacantia* taken upon the narrow seas was anciently, and I think at this day, taken by the admirall as his fee; which yet he takes in *jure regis*.

And this appears by the old articles of the admiralty entered in the black book of that court, wherein, though there be many extravagant articles, that no way belong to their jurisdiction, yet those that concern these things in question are good evidence what the usage was.

Among which this was one: *Item soit inquis de tous navires et bateaux, que sont troves waife sur le mere, dont l'admiral ne ad sa part à lui due d'office, c'est à dire la moiety.*

And again: *Item soit inquis de tous ceux, que ont trouve sur le mere flotesan tonne ou pipe de vyne ou doyle ou bales de madder de coffres ou autres choses dont l'admiral ne ad sa part à lui due d'office.*

And thus much for the *jus commune* of these adventures. But yet a subject may be intitled to these, as he may be intitled to wreck, viz.

1st. By charter.

2d. By prescription. And that is agreed in that case of Henry Constable, viz. that a man may have flotion, &c. by prescription between the high-water and low-water mark. Some of the west countrey prescribe to have it as far as they can see a Humber barrell. And much more may be had by prescription in an arm of the sea; and accordingly the barons of Barclay have ever had it in the river Severn, of the east side of the *filum aquæ*, over against their barony of Barclay.

These liberties of wreck, flotion, jetson, and lagon, and also of royal fish, may be parcell of or belonging to an hundred. But enough of this.

Now touching royal fish, therefore called so, because it is a common right such fish, if taken within the seas parcell of the dominion and crown of England, or in any creeks or arms thereof, they belong to the crown; but if taken in the

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sea, or out of the precinct of the seas belonging to the crown of England; they belong to the taker. 39. E. 3. 35. per Belknap.

Touching the kind of these fishes that are called royal fish, there seem to be but three, viz. sturgeon, porpoise, and *balena*, which is usually rendered a whale. *Claus. 5. R. 2. m. 29. de pisce vocato whale jam noviter ad terram in solo prioris de Merse alienigenæ in manu regis existente ad opus regis deferendo.*

But because ~~they~~ ^{one} may be great fish that come under no known denomination, we find the claim of such under the name of *piscis regius*, or sometime *grand pisce*, without any certain denomination. *Vide Claus. 20. H. 3. m. 3. dorso.* (2) A controversy between the king's bailiff and the prior of St. Swithen *de quòdam pisce regio* claimed by each without any distinct name. The prior procures the king's bailiff to be thereupon excommunicated, and the king commands his absolution. But salmon or lamprey are not royal fish.

By the common right of the king's prerogative these belong to the king, if taken within his seas or the armes thereof.

Anciently the intire sturgeon belonged not to the king; but only the head and the tail of the whale, according to Bracton, cited by Stamford upon this chapter of the prerogative.

According to the custom used in the admiralty, these great fish, if taken in the salt water within the king's seas, they were divided, and a moiety was allowed to the taker, the other moiety to the admiral in right of the king: one of the articles of the admiralty above cited being, *Item soit enquisse de ceux, que ont prise ou trouve sur le mere whales, balens, sturgeon, porpoise, ou grampise, dont l'admiral n'a sa part pur le roy, c'est à scavoire la moitié.*

Where observe these two things:

1st. That these royal fish extended to other than whale and sturgeon, viz. to porpoise, and *grampise*, or great fish.

2d. The admirall is to be answered for the king the moiety, which seems to expound Bracton as to the division of the whale. The king had the head, and the queen the tail, which counter-vailed a moiety; and the taker had the body, which counter-vailed the other moiety.

Thus much for the right of the king to these royal fish.

A subject might and may unquestionably have this franchise or royal perquisite,

1. By grant.

2d. By prescription within the shore between the high-water and low-water mark, or in a certain distinct *districtus maris*, or in a port or creek or arm of the sea; and this may be had

(a) In a ~~charter~~ patent dated 19. March 1782 in
signing Lord Vice-Chamberlain Mount Edgcombe, the
vice admiral for Cornwall, fishes
are mentioned with a namely of sturgeon,
porpoises, dolphins, riggs, & grampises, &
generally all other fishes whatsoever of a greater
or large bulk or fatness anciently by right X

This is a copy of our admiralty of England & preserved in any way of ascertaining or belonging to you

in gross, or as appurtenant to an honour manor or hundred, as appears by infinite precedents and examples and books of the law.

And this shall suffice concerning the rights of the sea and the creeks thereof according to the laws of England, as far forth as it is necessary to be known in order to what follows, viz, the havens ports and creeks of the sea within the dominion of the crown of England, which shall be the business of the second part of this discourse, as a necessary *præcognitum* to the customs and right thereof according to the laws of England.

PARS SECUNDA.

De Portibus Maris.

I see Hale's Mss. for par. Notes concerning rights of the crown. Chap. p. 201. The method of the ensuing discourse. Hale's own hand writing entitled

THE method that I propound to myself in the ensuing tract, is this.

I. I will consider, what a port of the sea is, and the differences of havens, roads, ports, and creeks.

II. The manner of the erection and creation and dissolution of ports.

III. The manner of the translation of ports to a subject.

IV. The history or narrative of certain particular ports, as Harbourn, Hull, Newcastle, for the explaining of the right of ports.

V. The threefold rights that meet in all ports of the sea.

(1.) *Jus privatum* of the port.

1st. In point of franchise.

2d. In point of propriety of the soil both in the land adjacent and in the sea.

(2) *Jus publicum* of ports; and herein of the liberty of access to and from ports; and of nuisances.

1st. More restrained, that concern the town where the port is situate, viz. forstalling and erecting houses between the port and the sea.

2d. More publick, and how redressed.

1st. Stoppage of the passage.

2d. Exactions of undue tolls or fees.

(3) *Jus imperii* or *regium*, and therein of what power by law there is of opening or shutting of the ports.

1st. In relation to the safety of the kingdom.

2d. In relation to the trade of the kingdom.

3d. In relation to customes; and herein of some port duties relative thereunto.

C A P.

*by him "de Har."
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A R S

C A P. II.

Touching the names of roads, havens, ports, and creeks. The nature of ports.

FOR the better explication of the nature of sea-ports, we are to consider some things and terms, that have cognition therewith, and the meaning of *portus maris*.

We find in common speech four terms, that usually occur in relation to the subject we have in hand, viz. a *road*, a *haven*, a *port*, and a *creek*.

A *road* is an open passage of the sea, that receives its denomination commonly from some part adjacent; which though it lie out at sea, yet, in respect of the situation of the land adjacent, and the depth and wideness of the place, is a safe place for the common riding or anchoring of ships; as Dover road, Kirkley road, Hung road.

A *haven* is a place of a large receipt and safe riding of ships, so situate and secured by the land circumjacent, that the vessels thereby ride and anchor safely, and are protected by the adjacent land from dangerous or violent winds; as Milford haven, Plymouth haven, and the like. And these are some large, some narrower. The smaller are sometimes made or at least helped by art; the greater are made only by nature.

A *port* is an haven, and somewhat more.

1st. It is a place for arriving and unloading of ships and vessels.

2d. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege, as shall be shewn.

3d. It hath a *villæ* or city or borough, that is the *caput portus* for the receipt of mariners and merchants, and the securing and vending of their goods and victualling their ships. And that a port is *quid aggregatum*, consisting of somewhat that is natural, viz. an access of the sea whereby ships may conveniently come, safe situation against winds where they may safely lye, and a good shore where they may well unlade; something that is artificial, as keys and wharfs and cranes and warehouses and houses of common receipt; and something that is civil, viz. privileges and franchises, *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority.

A port of the sea includes more than the bare place where ships unlade, and sometimes extends many miles; as the port of London anciently extended to Greenwich, in the time of King Edward the first; and Gravesend is also a member

the port of London; the port of Newcastle takes in all the river from Sparhawk to the sea; the like for the extent of Yarmouth, Bristol, &c.

The *caput portus*, or town that gives its denomination, is sometimes unaccessible by ships or great vessels, but only by small vessels or lighters; and yet it gives the denomination to the port, and is the head of it. Thus Exeter is the *caput portus*, yet no vessels of burthen come within four miles of it.

T. 33. E. 1. rot. 55. *Hibernia*. An inquisition is had touching the port of Dublin, *qui dicunt, quod nullæ magnæ naves, creatae vinis seu aliis merchandisiis, applicare possunt in portu Dublin, quousque in parte discarcantur, quod ex consuetudine hæcenus tantâ hujusmodi naves earcatae vinis in veniendo versus Dublin errari consueverunt apud Dalkey, et ibidem se ex parte discarcare; vina sic discarcata per naviculas usque in civitatem Dublin ducere, absque aliquâ prisâ ibidem præstandâ, et similiter absque hac ad captor vinorum domini regis aliqua vina ibidem nomine prisâ signaret, et post hujusmodi discarcationem naves illæ cum restis vinis suis applicare consueverunt apud Carnan, quæ est infra precinctum prædictæ civitatis, et tunc captor hujusmodi prisarum sua voluntate et electione capere consuevit prisam domini regis, de vinis sic in manibus prædictis relietis, vel de ipsis vinis prius earcatis, sive vina illa fuerint infra cellaria sive non, ita tamen ut fiat nulla venditio de hujusmodi vinis, antequam prisâ illa capta erit, sine licentiâ captorum prisæ illius.*

I have inserted the whole inquisition, because I shall hereafter use it to another purpose. But I use it here only to this end, to shew that the *caput portus*, and which gives it the denomination, is not always the next place of great vessels. The same is seen also in the port of Bristol and divers others.

In respect of this extensiveness of a port beyond the vill that gives its denomination, if a thing be alledged to be done in the port of Blakeney, the *venire facias de vicineto portus* is good, H. 6. 22. But yet because the court cannot take notice *ex officio*, that it extends farther than the vill, a *venire facias de vicineto de Blakeney* hath in that case been ruled good.

And thus much in general for the signification and description of a port.

A creek is of two kinds, viz. creeks of the sea, and creeks of ports.

The former sort are such little inlets of the sea, whether within the precinct or extent of a port or without, which are narrow little passages, and have shore of either side of them. The latter, viz. creeks of ports, are by a kind of civil denomination such. They are such, that though possibly for their extent and situation they might be ports, yet they are either members of, or dependent upon other ports. And it began thus. The king could not conveniently have a customer and comptroller

comptroller in every port or haven. But these custom-officers were fixed at some eminent port; and the smaller adjacent ports became by that means creeks, or appendants of the same, where these custom-officers were placed.

The state of the ports and creeks thereof upon this account at this day stand thus, viz.

*See Rep^y
of Comm^{rs}
of Pub^l.
Act n^o.
15. p. 89.
of Mod. Stat^{es}
of 1726 in
Customs Reven.
Proposals
published
in 1731, page
1. 16726.*

LONDON <i>cum membris</i> ;	Longston,
London,	Lymington,
Blackwall,	Hurst Castle,
Gravesend,	Upchurch,
Lee.	Cowes,
	Yarmouth.
SANDWICH <i>cum membris</i> ;	POOLE;
Sandwich,	Poole.
Deal,	WEYMOUTH;
Ramsgate,	Weymouth.
Margate,	LYME;
Milton.	Lyme.
FEVERSHAM;	EXETER <i>cum membris</i> ;
Feversham.	Exeter,
ROCHESTER <i>cum membris</i> ;	Apsham,
Rochester,	Tidcomb,
Queenborough.	Sharecross,
DOVER <i>cum membris</i> ;	Pouldram,
Dover,	Sydmouth,
Foulkstone.	Austerton.
CHICHESTER <i>cum membris</i> ;	DARTMOUTH;
Chichester,	Dartmouth.
Meecham,	. BARNSTABLE <i>cum membris</i> ;
Shoreham,	Barnstable,
Newhaven,	Appledore,
Arundell.	Newke,
RYE <i>cum membris</i> ;	Biddiford.
Rye,	Ilfordcum,
Winchelsea.	Clovelly,
Hastings,	Hartland,
Pevensey.	Combmartin,
SOUTHAMPTON <i>cum membris</i> ;	Watermouth.
Southampton,	BRIDGEWATER;
Portsmouth,	Bridgewater.
Gosport,	

PLYMOUTH

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Baghill.

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[Presfull]

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Sanchbridge.

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MINEHEAD;
[Creeke]

Presfull,
Creeke.

CARLISLE;

ARDIE cum membris;

Carlisle.

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NEWCASTLE cum membris;

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Newcastle,
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Blithnook,
Sunderland,

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LIFORD cum membris;
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Hartlepool,
Stockton,
Whitby.

KINGSTON cum membris;

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Kingston super Hull,
Scarborough,
Bridlington,
Grimby,
Yorke.

ABERDOWY;

um membris;
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BISTOL cum membris;

BOSTON cum membris;

Fill,
GLOUCESTER;
etter.
ESTER cum membris;

Boston,
Saltfleet,
Spalding,
Wainfleet,
Fosse-dike,
Sutton-marsh.

LYNN cum membris;

ATER;
L. I.

Lynn,

Heatham,

PLYMOUTH

*Palmouth is described in a return
to the exchequer as being from 29. Ch. 2.
the port of Palmouth in the county
of Cornwall a member of the port of
Plymouth in the county of Devon & H. M.
of Excheq. in Custom Reven. Proport. 51.*

Heafham,
Burnham,
Wisbeach,
Crossekey.
YARMOUTH *cum membris*;
Yarmouth,
Norwich,
Clye,
Leystoft,
Southold,
Aldborough,

Woodbridge.

IPSWICH *cum membris*;

Ipswich,
Harwich,
Manytrees.

COLCHESTER *cum membris*;

Colchester,
Wyvenhoe,
Blockhouse,
Malden,
Burnham.

Thus stands the state of the ports wherein there are customs and comptrollers; and the members or creeks of those ports where there are none; but only these officers in the principal ports substitute servants to observe and take notice of goods imported and imported, to see that they agree with the entries made at the principal ports. *Vide stat. 4. H. 4. cap. 20. ag. unlading in creeks.*

And by the statute of the 1. El. cap. 11. no person is to have any goods in the ports of London, Southampton, Bristol, Westchester, and Newcastle, but at such keys or wharfs as the queen should appoint before September next; nor in any other port creek or haven, Hull excepted, but where a customs comptroller and searcher, or the servants of any of them, have been resident by the space of ten years last past, or shall thereafter be resident, upon pain of forfeiture of the goods so landed; which was the greatest and most effectual limitation and restraint of ports that could be, because it left it in the king's power to restrain any other ports than those that were then used for the unlading of goods.

And thus much in general for the nature of ports. The particulars will occasionally emerge touching their nature what ensues.

C A P. III.

Concerning the manner of erecting of ports; and by whom to be done.

THIS kingdom is an island, and the ports of the kingdom are the gates, *ostia regni*, as well in reference to the exercise of trade, as in reference to the safety and security against foreign enemies.

And every publick port is a franchise or liberty, as a market or a fair, and much more.

For, 1st. it is a place of common resort of merchants and shipping, *arrivagium navium et batellorum*, within itself a franchise.

2d. And, secondly, every port had of necessity a market belonging to it, as well for the vent of merchandizes that were imported or to be exported, as for the vent of victualls and provision for the supply of mariners and victualling of ships; and therefore, if any did erect any victualling houses between the port town and the sea, it was punishable.

3. And, 3dly, to every publick port there were certain common tolls incident, as for wharfage and land-leave and the like, which by law cannot be taken without a lawful title by charter or prescription. It was one of the articles in *Eyre de notis consuetudinibus levatis in regno, sive in terrâ, sive in aquâ*; and therefore, *Pas. 11. Car. B. R.* in the case of Morgan, against whom an information was preferred for taking certain rates for merchandizes unladen upon his own land at Crochampill near Bristol, it was resolved, that though he might take amends for his trespass in unlading upon his ground, yet he might not take as a certain common toll; and for so doing he was convicted, and fined one hundred marks.

Upon all these considerations it is evident, that the king hath a special concern and interest in the franchise of a common port; and consequently from hence it is evident,

(1st.) That no subject may institute or erect a common port without the charter of the king or a lawful prescription; and if he doth, the liberty or pretended liberty is seizable in a *quærento*, and the party that doth it is to be fined and to be adjudged, *quod omnia signa portus penitus amoveat*. Thus it is done in the case of the prior of Tinnmouth, 20. E. 1. the word whereof follows in the chapter where we come to speak of the nuisances of a port, and how remedied.

(2d.) As a subject cannot erect a publick port for all common, so he cannot without a lawful prescription or charter erect a port for the men of such a fee or precinct, as for his own tenants.

Both these former assertions appear in the notable case of the port of Waterford and Ros, which though in Ireland, yet the law is the same there as in England as to this purpose.

Claus. 11. H. 3. m. 3. it appears, that the king granted to the Earl of Penbroch such a kind of restrained liberty of a port.

concessit et licentiam dedit Willielmo comiti Mariscallo, quod ei de dominicâ terrâ suâ, cum mercandis in eis contentis, liberè adiret et sine impedimento veniant ad portum suum de Rosse, et inde recedant, dum tamen aliæ naves de terrâ ipsius regis, et naves de aliis terris venientes in Hiberniam, eant

Waterford & Ros

et veniant ad portum de Waterford. Et mandatum est G. de Mariscal, quod naves de terrâ ipsius comitis ad portum suum venire permittat, et alias naves ad portum de Waterford.

Here was a restrained port not free to all; and the earl had not the king's charter before he could erect it. The earl, being a great prince in Ireland, and having gotten this footing, grew upon it, and accroacheth the liberty of a common port for all comers; and thereupon there issued out of the chancery this enforcing writ, directed from the chancery in England to the Justiciarius Hiberniæ, viz. Claus. 20. H. 3. m. 4. *Cum villa nostra de Waterford, sicut audivimus, plurimum deteriorata est per applicationem navium, quæ, omisso portu ejusdem villæ, veniunt apud Rosse et insulam in terrâ G. Mariscal, comitis Penbroch; mandavimus eidem comiti, quod nullæ naves in terrâ suâ prædictâ applicare debeant, nisi illi solûmodo, qui fuit de terrâ suâ propriâ, et hoc permissione nostrâ: prohiberi facias, quod naves aliquæ, nisi navium hominum suorum de terrâ suâ propriâ de cetero non applicent apud Rosse, nec apud insulam, per quod prædicta villa nostra dampnum incurrat; quod nisi facere voluerint, per nos fieri faceremus, et id vobis mandamus, quod clamari facias, et firmiter inhiberi, aliqua navis, quæ non sit de propriâ terrâ ejusdem comitis, apud Rosse vel insulam applicare de cetero presumat, super forisfactum nostram; sed magistri et marinarii tendent et occident cum navibus suis et mercandis usq; Waterford si voluerint, et ibidem negotium sicut seipfos volunt indemnes conservare.*

And the like mandate almost verbatim issued by proclamation Pat. 19. E. 1. m. 10. dorf. But note, that afterwards there was a composition settled between the ports of Rosse and Waterford, by the king's award. Vide Trin. 50. E. 3. B. rot. 19.

By this it appears,

1st. That the liberty of such a special restrained port is not to be taken up without warrant by charter or lawful prescription.

2d. That being granted, it cannot be enlarged to be a common port to all comers.

3d. Much less can such a common port be usurped without lawful grant.

(3d.) But yet farther it seems, that a subject cannot, neither could by law at any time after customs were settled, arrive with customable goods and ship of his own at his own land, unless it had been a publick port where the king's officers for the collection of those customs were settled; for this were to defeat the king of his duty: and consequently it seems, that not only the non-payment of the king's duties was punishable, but even the first application to his own port, whereby the king's officers were prevented

not only of the duty, but of the means of discovery of it. Punishable it was by fine, as a contempt or deceit to the crown; but forfeiture of the goods could thereby accrue, till the statute the 1. El. cap. 11. had made a provision therein. And this seems to be reasonably inferred upon the case of John de Brinonia for the port of Little Yarmouth, set down at large in the ensuing fifth chapter, and the award of the king's council touching the same.

(4th.) But any man might bring and unlade his own private goods, which are not customable, in his own private ship or vessel upon his own land, as fish taken by Englishmen; for there was no accroachment of a port at common law, and fish excepted out of the statute of 1. El. c. 11. And this may likewise be plainly collected by the decree of the king's council made in the case of Little Yarmouth, hereafter mentioned.

In case of necessity, either of stress of weather, assault of pirates, or want of provisions, any ship might put into any creek or haven, stat. 4. H. 4. c. 20. And though regularly ports themselves ought to find provisions for ships and mariners, and ought not to be anticipated or forestalled therein, shall be shewn; yet in case of necessity, or for the supply of fishermen, all places were as to that purpose and end ports. And this appears by the statute of 31. El. cap. 7. against cottages, wherein are accepted such cottages as are erected within a mile of the sea, or upon the side of such part of any navigable river where the admirall ought to have jurisdiction, along as no other person shall therein inhabit but a sailor, or be of manual occupation to or for making, furnishing, or equalling any ship or vessel used to serve on sea.

And thus far we have considered, how far forth private subjects may or may not erect any port. But yet farther:

A lord of a county palatine, though he may have and use private ports by charter or prescription, yet he cannot erect a common port within his palatine jurisdiction. And the reason is because the concernment of a port must necessarily exceed the extent and limits of his *jura regalia* that are incident to a county palatine; for the safety of the kingdom, the commerce of the kingdom, and the king's revenue, are concerned in it. Merchants and seamen of all parts and quarters of the world let into the kingdom publicly, and under the publick protection in a publick port; and consequently it is not within the extent of a jurisdiction palatine *de novo* to erect a publick

And now we have seen in whose power it is not to erect or erect a port, it easily lets us see in whose power it is. It is a part

part of the *jus regale* or royalty of the crown of England originally and *de novo* to erect publick ports in this kingdom. all franchises within the kingdom are derived from the crown either immediately and explicitly, as by new erection, grant or charter; or presumptively and consequentially, as by custom or prescription; so in a special manner are the ports and the franchises thereof, which are *offia regni*.—And concerning the manner of the creation, erection, or institution of a port in the next chapter.

C A P. IV.

Touching the title or origination of ports by prescription patent, charter.

ALTHOUGH the more regular method were to begin with the origination of ports by charter or patent, because that shews the first constitution of them; yet, because it is more suitable to my design, I will begin with that which is by custom or prescription.

I have before intimated, and in the ensuing discourse more distinctly shew it, that in the consideration of a port there are these two things involved, viz.

1st. The consideration of the interest of the soil both of the shore or town, which is the *caput portus*, and of the soil of the haven itself wherein the ships do ride or apply.

2d. The consideration of the interest of franchise, or liberty itself; that civil signature which doth give the liberty of publick arrivage itself, which is in truth the *formale constitutus* of a port, in a legal signification.

Both these are acquirable by prescription, without any formality appearing, though presumed. *Ex diuturnitate temporis omnia præsumuntur rite acta.*

By this title a port may without question be settled in the crown; and indeed upon that account most of the ports in England, both in point of franchise and propriety of soil, are at this day lodged in the crown; as will easily appear by the perusal of the catalogue of the ports and creeks of England before expressed, though most of them are now in the hands of the towns of the ports.

and upon the same title and account they may be settled lodged in the subject, as well in point of propriety of soil, in point of franchise; and so were many ports of the sea, which were enjoyed by subjects by the title of prescription without any charter thereof extant, or at least for most of them: and of this we shall give some instances.

In *originali 3. Ed. 1. libro rub. 256.* (which I shall have after occasion to use) it appears, that many ports were held by subjects. *Et le roy ad graunt de la grace que toutes seigniories per qui ports lames on quiryres aient les forfeitures et els avendront, chescun en son port, save au roy demy marke de un sack de line et de pens et un marke de chescun last de quires.*

The earls of Chester had the port of Liverpoole as belonging to the county palatine of Chester, and possibly divers other ports within that earldom palatine, and had their prisage wines. *Claus. 40. E. 3. m. 22. pro Stephano de Ward*, who there by the king's writ discharged of prisage, because he had paid to the king for the same wines.

In *placita parliamenti de tempore E. 1.* the port of Milford partly belong to the county palatine of Penbroch, which was the inheritance of that earl and Joan his wife, and partly belong to the barony of Haverford west, then in the king's hands by certain metes and bounds. Remedy provided against encroachments of the king's bailiff upon the earl's port.

The port of Hartlepoole did sometime belong to Robert de Brus; for the record saith, *quod Robertus de Brus habet mercatum et feriam apud Hartlepoole, et portum maris, et habet ibidem regium et prisam piscis.* For the rebellion of Robert de Brus against the king, it seems the bishop of Durham, who hath a great escheats within his county palatine, came to be owner of the port, and accordingly made title to it, and held it, and had his prisage of wine within the same. *Communia Trin. 6. E. 3. caccario.*

The port of Toppeham belonged to the earl of Devon. *West. 12. E. 1. n. 1. Portus et piscaria et mariscus de Toppeham spectant Amicie comit. Devon.* It appears *m. 3. et 4. E. 1. in rege, Rot. 16. Devon*, that there was a contest between the countess of Devon and the mayor and burgesses of Exeter, who had the port of Exeter in fee farm, touching certain usurpations by them upon the countess at Toppeham; and upon the issue joined a verdict given for the countess, viz. *Juratores dicunt, quod Baldwinus de Riperiis, quondam comes Devon, et antecessores sui à conquestu Angliæ, et similiter Amicia comitissa Devon, quæ manerium de Toppeham tenet in dotem, fuerunt in causa, quod mercatores ad prædictum portum venientes, pro voluntate sua poterunt ad dictum portum de Toppeham naves suas applicare, et mercaturas suas ibidem exonerare, et per particulas et in grosso*

Upon these records it appears,

2d. They had also the franchise of the port by prescription, and all the incidents thereof, viz.

1st. *Applicatio navium.*

2d. *Exoneratio navium.*

3d. *Mercatum et venditio mercandiarum in gross et per re*

4th. Victualling of mariners and ships.

5th. Lodging and entertainment of mariners.

All which are privileges in a special manner belonging to the commons, and cannot be had without that liberty legally veiled, as shall be shewn in due time.

P. 10. E. 3. B. R. rot. 73. dorso, it appears, that *William Denlarrena*, comes Surrey, had the port of Poole, and another age and other duties belonging to it.

It appears among the charters of the duchy of Cornwall, transcripts whereof remain in the receipt of the exchequer, that *Rogerus de Valle-tortuaria* gave to Richard king of Romans and earl of Cornwall, and the heirs of his brother *castrum de Trematon* et 59 feoda militum in Cornwall et Devon. *idem castrum pertinet. ac etiam manerium de Trematon et villam Esse cum aqua.*

To this castle of Trematon belong a certain petty manor called Sutton-vantort, and also the water and port of Sutton for so it appears by the close roll, *Claus. 17. E. 2. m. 14. N. cum aqua et portu spectat ad castrum de Trematon.*

2. By the death of Edmond his son without issue, the earldom and this castle came to the crown. Possibly Richard earl of Cornwall, after issue had, made some alienation before the statute of Westminster 2. whereby the reversion to the heirs male of Vantort was barred.

The earldom of Cornwall and this castle of Trematon descended to king Edward 3. He by charter in parliament gave the earldom of Cornwall to his eldest son, *et castrum et manerium de Trematon cum villâ de Saltaſh et parco ibidem cum pertinentiis*. See the charter 8. Rep. 8. the Prince's Cases

the same subject as the Treatise here printed.
Ed. 16. 4. & 17. 4. 6.

By this grant, without any special mention of the water or port as belonging to it, the port and water of Sutton, now Plymouth, was annexed to the duchy of Cornwall; for though the charter grants *prisas et custumas vinorum, necnon proficua portuum et piscorum infra eundem comitatum Cornub. simul cum wrecco maris balenâ et sturgeone*, yet that did not extend to the water of Sutton, which was in Devon, but it passed by the strength of its being parcell of and appendant to the castle of Trematon.

The town of Plymouth, which is indeed caput portus, from hence the port now takes its denomination, was not part of Remeton, but built upon the manor of Sutton Prior, and was incorporated and its jurisdiction settled by act of parliament, Rot. Parl. 18. H. 6. n. 32. and confirmed by Rot. Parl. 3. E. 4. n.

But always in both, whatsoever was parcell of the manor of Trematon was excepted; and consequently the haven itself, which was parcell of Trematon, was not annexed thereby to Plymouth, but stood upon the same foot of interest as before.

There lyes adjacent to this town, within the barbian there, a
ce of about 30 acres, which is covered every tide with the
and ships ride there and come to unlade at the keys of Ply-
outh, commonly called Sutton Poole; for the interest of the
of those 30 acres being parcell of the port, and information
intrusion was, as directed out of the exchequer-chamber,
ferred against the mayor and commonalty of Plymouth. The
endants pretended title to it as parcell of the town of Ply-
outh, and shewed usage to have had certain customs called
d-leave, terrage, &c. But these referred to the shore rather
n to the place in question. They alledged it was also within
limits of their charter, and that they exercise jurisdiction of
their courts there; both which were admitted. But it was in-
ded upon, that the soil itself was excepted, as parcell of the
title of Trematon; and divers other evidences were insisted
on for the town. On the other side it was shewed, that the
king had used to have in right of his duchy in the place in question
storage, buffelage, fishing and the rents of fishers, and divers
other port duties that favoured of the soil; as appeared by divers
accounts of the duchy, divers records mentioning Pola de Sutton
a parcell of Trematon, several leases made by the king's pro-
motors of Aqua et Pola de Sutton, and some to the town itself or
some in-trust for them, and divers other weighty evidences
the propriety of the soil of Sutton Poole's being the very har-
bour itself, and belonging to Trematon; and accordingly a ver-
dict given for the king, *M. 16. Car. 2. in Scaccario*, after seven
years evidence.

have mentioned this the rather ; because

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Britannia
3

1. Here the very interest of the port and water and soil to port duties themselves were claimed and recovered by the crown not upon any prerogative title, for if it had been so it would have passed to the town of Plymouth, being within the precincts of their incorporation and grant, and then the exception of Trematon had not been available; but as parcell of and belonging to a manor that was formerly a subject's.

2. Though the king *primâ facie* hath a right to ports of royal franchise, yet the accession of this manor to the crown did not sever the interest of the port from the manor, no more than in case of a fair or market appendant by prescription; for if the accession to the crown it had been divided from the castle or manor, it could not have passed without special words to the prince, as it plainly did here. As the port was by prescription parcell of the castle of Trematon, so it continued parcell notwithstanding the accession thereof to the crown by the death of the earl of Cornwall without issue; and it passed together with the castle by the general grant of it, as a leet or market, or any other parcell or appendant; and so not like those flowers of the crown which are rendered disappendant by accession to the crown, waife, stray, &c. *V. 9. R. Cas. Abbatis de Strata Marcella.*

Many more instances might be added of ports belonging in private manors to subjects by right of prescription; and some will occur in the necessary series of the discourse; as the case of John de Britannia for a port claimed belonging to the manor of Little Yarmouth, and the case of the archbishop of York for the port of Beverley and Hull. But of both these and some others in the following chapter.

And thus much of ports by prescription.

Touching ports created by patent or charter, I mean the civil or legal port; for the natural situation and conveniency of creeks and shores for arrival of ships is due to nature, and the supports to industry.

Ports are erected two ways:

1st. In the king's own demesnes they may be erected barely by grant and proclamation; as the king usually erects a fair or market in his own manor or town in this manner. *Rex vic. Essex festum. Quia volumus quod de cetero in perpetuum sit unus portus communis pro arrivatione navium et exoneratione mercandisarum a villam nostram; tibi præcipimus, quod in pleno comitatu tuo pro mari facias, quod de cetero in perpetuum omnes naves, cum bonis mercandis et aliis rebus in eisdem existentibus, liberè et quietè vaneant apud prædict. ac ibidem bona et mercandisas suas exoneratione possint sine impedimento nostro, hæredum vel successorum nostrorum, salvo nobis custumis et aliis bonis inde debitis. T. R.*

the liberty or erection of it be transferred or granted to another, it is done by patent or charter, and commonly also proclaimed in the county.

Vid. Pat. 1. E. 3. par. 1. m. 27. The exemplification of a charter of H. 2. whereby this liberty is granted in a few words,

H. rex Angliæ, &c. omnibus archiepiscopis, episcopis, &c. Sci-
me dedisse et concessisse Willielmo de Albani pincernæ nostro, et
medibus suis hereditariæ, manerium de Snetisham cum duobus
tredecis et dimidio de Tredebury et Smethden cum wrech et cum
libus pertinentiis suis, et misteria de lunâ cum medietate fori et
et cum omnibus consuetudinibus et portum cum applicatione
sum, et lestop et viam ipsius aquæ et transitum, cum omnibus
melis, &c.

art. antiq. Cl. 7. H. 2. grants to the abbot of Whitby *portum*
is cum toll et team, et cum omnibus libertatibus et consuetudinibus
portum maris pertinentibus, viz. apud Whitby.

Vide ibidem D. D. n. 5. King William the first grants to the
abbey *portum maris cum algâ per totam suam terram. Alga*
pounded to be *wreccum. Vid. ibidem D. D. 26.*

ar. antiq. fol. 17. king William the first confirms to the monks
Trinity Cantuar. portum de Sandwico, et omnes exitus et consuetu-
ex utrâq; parte aquæ, sicut rex Edmundus eos antea dedit.
nota, the archbishop recovered this port and the customs
of upon the charter of king Knute.

some, but especially in latter times, the charters granting
ports are more large and certain, expressing the bounds of
port.

The king may grant a port general, as before, or a restrained
viz. for such as are of the fee of the grantee, as in the case
before mentioned.

more shall be said concerning the erection of ports by patent,
the clauses of restriction that are sometimes in them, in the
chapter.

C A P. V.

the king may erect a port to the prejudice of another; and
concerning restrictive clauses in charters to ports.

the king erect a market by charter and grant it over, or if a
man have a market by prescription, if the king erect another
set at such a distance and at such a time as is a nuisance and
edice to another market, the first grantee or owner of a
set may have an action upon the case against the second
grantee,

grantee, if he hold that market; for as to him the patent is neither should it have been granted without an *ad quod damnum* precedent, and an inquisition returned that it is not *ad damnum*.

But it seems the law is otherwise in the case of a port. If a man hath a port in *B.* and the king is pleased to erect a new port by that, which it may be is more convenient for merchants; it be a damage to the first port, so that there be no obstruction of the water or otherwise, but that ships may if they will arrive at the former port, this it seems may be done. But then this new port must not be erected within the precincts of the former. The reason of the difference between it and a market are evident, because that a port is of concernment to the whole trade of the kingdom, and also to the defence of the kingdom, the increase of shipping and mariners, and the increase of the king's revenue, which is of a common good to the kingdom; and therefore the king may erect a concurrent port though near another, so it be within the proper limits of the former; as shall be shewn in the case of Hull and Yarmouth hereafter mentioned.

But, 1. it cannot be erected within the peculiar limits by charter or prescription belonging to the former port, because that is part of the interest of the lord of the former port. Neither may the first port be obstructed or wholly defaced, or excluded for the arrival of ships, but by act of parliament, as was done in the case of Melcombe translated to Poole. *Rot. Parl. 11. H. 6. n. 1.* And the reason is, because a publick interest is concerned; the interest of the merchant at large, and the interest of the soldiers and mariners in that particular place or port, who have their right settled in them for the application, lading, and unloading of ships there.

2. If the king have an ancient port at *A.* and he erect another port hard by, with a generall prohibition that no man shall bring his goods or merchandizes by sea to any other port within five miles but to that which is newly erected, this prohibition is good as against the king's interest in the former port, though the new port be erected within the precincts of the old; for he may discharge from his own simple interest by his own restriction. But this restriction is not good against the subjects of the port of *A.* who by usage had a right to come with their own shipping, and load and unload: and this although the goods might be customable goods for the inhabitants of *A.* had an easement acquired to them by prescription.

3. But if the king erect by his own proclamation a port at *A.* where there was no arrival of ships before, and doth not grant it to another person, but keeps the interest in himself, this franchise; there it seems the king may dissolve this port and erect another port, with a prohibition that no ship shall

in such a distance, but at the new port: for there was no
of arrivage of any ships at the former harbour lodged in the
inhabitants nor any other subject, but only permissive at the
king's pleasure, and he may derogate from his own right.

But if a subject hath a port and arrival of ships at *B.* by
prescription or charter, and afterwards the king erect a new port,
in three or five miles within or without the precincts of the
of *B.* with a prohibition that no ships shall arrive within five
miles of the new-erected port elsewhere; this prohibition or re-
striction is void, as against the interest of the owner of the port
or the inhabitants of *B.* because there was a former interest
in the owner and inhabitants of the port of *B.* which
shall not be taken from them without their own consent, or by act
of parliament.

But if a subject, or the king's fee-farmer, hath a port at
by prescription or charter, and the king grants that no ships
shall arrive within five miles or such like compass, the king can-
not within that precinct erect *de novo* a port to the prejudice of
the port to which he had precedently granted this privilege.
The grant is good as against the king, and any interest de-
rived from him after this grant: and although, as hath been said,
without this restrictive clause, the king might have erected a port
near to the former, which would have had this concurrent power
of franchise, yet the king hath bound up his hands by his own
grant; and by this inhibition, the precinct, to which this in-
terest extends, is become as it were parcell of the precinct of
the port.

These diversities will appear by the two cases following,
which shall put at large.

The case or rather history of the port of Great and Little
Yarmouth, which makes good the most of the differences above
stated, was this:

The king had anciently the great port of Great Yarmouth,
where his custom-house was kept, and his customes answered
since there were customs, extending from Great Yarmouth
to the sea. The king anciently granted this town and the port
to the burgesses of Great Yarmouth at
an annual fee-farm rent. *Cart. antiq. K. 35. Cartam inde
factam per regem Johannem anno regni sui 9^o.*

The king was likewise seized of the manor of Little Yar-
mouth, lying between Great Yarmouth and the sea and within
the precincts of the port of Great Yarmouth; of which manor
the Yarmouth the town of Gorleston was parcell.

In the manor of Little Yarmouth there had been ever ancient-
ly a small port for arrival of ships, as well of foreigners as of
the

the tenants; and this seems to be belonging to the manor of Little Yarmouth, and the king had port duties there to a considerable sum.

King Edw. 1. being thus seized of this manor perma-
John de Britannia, earl of Richmond, to hold this manor
port of Little Yarmouth at will.

The same king, during this possession of John de Brit-
viz. granted to the burghesses of Great Yarmouth
their successors, *quod omnia mercandisa et mercimonia quæ
sive sunt de piscibus sive de aliis rebus quibuscunque, infra
portum dictæ villæ, quæ infra dictum portum dictæ villæ
næ Fernemuthe, in navibus aut batellis, seu alio modo adduc-
deferri contigerit, ut ibidem negotietur de eisdem, licite et aperte
eandem villam de Magna Fernemuthe et non alibi infra
prædictum discarcentur, et ibidem vendantur, absque aliquo
lamento vel abrochiamento vel aliquo alio impedimento.* This
ter was granted without any antecedent writ of *ad quod dam-*
as was usual in cases of such extraordinary grants.

The town and little port of Little Yarmouth, being be-
Great Yarmouth and the sea and within the precincts of
Yarmouth; shortly after the same king granted the manor
Little Yarmouth and Gorleston unto the same John de
tannia, and the heirs of his body, together with all fair
markets and franchises, as fully and freely as John de
held the same; which manor and also the port thereun-
longing the said John de Bayliffe it seems formerly held.

After this grant there arose great suits between the bur-
of Great Yarmouth and John de Britannia and his tenan-
Little Yarmouth and Gorleston, touching the privilege of
port; those of Great Yarmouth insisting upon it,

1st, That the whole port belonged to the farm of Great
mouth, and that Little Yarmouth was not indeed a port
rather an usurpation and forestall upon the port of Great
mouth.

2d. That if it were any such thing as a port, yet at the
of the charter granted by the king to those of Great Yarm-
that merchandizes should be unladen at Great Yarmouth
alibi, the manor and port of Little Yarmouth was in the
and the ancestors of John de Britannia were then only
at will to the king, and the grant of the inheritance there-
John de Britannia was subsequent to that charter of
Yarmouth, and the king might well derogate from his
interest when the charter was granted; and consequent
interest of John de Bretagne, being subsequent to the char-

Great Yarmouth, was subject to and bound by the restriction
inhibition. And surely as to the interest of franchise that
is claimed by John de Britannia, they said very true.

Upon this suits were commenced in the common-pleas against
any of Little Yarmouth for forestalling the port of Great Yar-
mouth; which suits were long staid, because John de Bretagne
was not made party, and because the king's interest in reversion
was concerned. And touching this matter cross petitions were
offered in the parliament of 8. E. 2. and inquisitions directed
to be taken touching both interests, as appears *Rot. Parl.* 8. E.
m. 9. And though I do not find upon record what issue this
yet it seems by the book of 2. E. 3. 7. *per Claver*, that in
parliament the charter of Great Yarmouth was affirmed *per*
counelle le roy; which is to be intended the *legale concilium re-*
liquum either in parliament or in chancery.

But yet John de Bretagne did not rest satisfied with this de-
termination, but petitioned again in parliament; setting forth
the whole case, and that the men of Great Yarmouth by colour
of their charter, gotten without any writt of *ad quod damnum*,
had disturbed him of arrival of ships at Little Yarmouth.

This petition is sent by writ to the king's-bench; and after a
d of declaration upon the petition, the defendants, viz. those
of Great Yarmouth, pleaded in effect thus:

As to the king, they have his charter, that ships should
be discharged *ibi et non alibi*.

As to John de Bretagne, that at the time of the grant
made to them he was but tenant at will to the king, which is too
weak an estate to impeach their grant.

*Quant al gents de county nous diomus, que les ports sont al
roy, et fair et market sont al roy, qui tiel chose purra graunt à que
il dra.*

And upon this they demurred; and the case, for weight and
difficulty, was again resumed into parliament. This appears by
the book of 2. E. 3. 7, 8.

It lodged in the parliament for a long time; but afterwards it
received a decision 23 Junii, anno 5. E. 3. by a bond of judg-
ment or award, by the consent of the king and submission of par-
ties, made by the bishop of Winton chancellor, Stoner and Cart-
right justices, Robert Ufford and Oliver Ingham, *et alios de
consilio*; who, upon a full examination of the rights, claimes,
evidences of both parties, gave their judgment, which was
confirmed by the king by patents under the great seal, and enter-
Rot. Pat. 5. E. 3. pt. 1. m. 1. which was not only an arbitra-
re determination, but in nature of judgment upon the meritts of
the cause.

They

They first recite the charter of Great Yarmouth, the fact that had arisen in divers courts between them, the examinations and inquisitions that had been taken touching the right of either party, and then adjudge and determine as followeth :

1. *Portum Fernemuthe unicum portum esse, et ad eandem villam Fernemuthe Magnæ in perpetuum declaraverunt et ordinarunt.*
2. *Quod naves, omnes, quæcunque fuerint, infra portum aquam de Fernemuthe cum bonis rebus seu mercandis, de quibus customa ad opus domini regis hæredum et successorum suorum per collectores suos ad hoc assignatos seu assignandos sicut in aliis portibus regni in Anglia, levari seu capi debent, veniant apud dictam villam de Magnæ Fernemuthe, et ibidem custumas solvant ; et apud eandem villam Magnæ Fernemuthe et non alibi, infra portum prædictum discarcentur, et per manus bona res et mercandis prædictas ducentium seu deferentium et ea ibidem vendere volentium, seu per manus servientium suorum, venditioni exponantur, et ibidem quibus voluerint liberè vendantur et emanant absque aliquo forestamento vel abrochiamento, seu alio quovis impedimento ; propriis navibus ipsorum hominum et tenentium dictarum villarum Parvæ Fernemuthe et Gorleston, hæredum et successorum suorum, tantummodo exceptis.*
3. *Quod naves dictarum villarum de Parvæ Fernemuthe et Gorleston, oneratae cum bonis de quibus customa ut præfertur debita sunt, ad eandem villam Magnæ Fernemuthe veniant, ibidem custumas suas solvant, quibus custumis ibidem persolvi præfati homines et tenentes dictarum villarum Parvæ Fernemuthe et Gorleston, hæredes et successores sui, cum prædictis navibus suis, et servientes sui cum navibus illis, ad easdem villas Parvæ Fernemuthe et Gorleston pro voluntate sua redeant et ibidem discarcent, vel alibi eant quod voluerint, et bonis rebus et mercandis in eisdem navibus existentibus eodem modum suum facient, sine impedimento ipsorum burgensium hæredum et successorum suorum quorumcunque, et absque quod ad dictam villam Magnæ Fernemuthe contra voluntatem discarcare, seu alias custumas ipsorum burgensium Magnæ Fernemuthe hæredum seu successorum suorumolvere compellatur seu teneantur : ita tamen, quod si iidem homines et tenentes prædictarum villarum Parvæ Fernemuthe et Gorleston, hæredes vel successores dictas naves suas proprias ad prædictam villam Magnæ Fernemuthe gratis discarcare voluerint, tunc de navibus illis et bonis et rebus et mercandis in eisdem existentibus alias custumas debitas et usitatas dictis burgensibus villæ Magnæ Fernemuthe, prout justum fuerit, solvant.*
4. *Quod omnes aliæ naves bonis rebus et mercandis quicunque, sive de allece sive de aliis piscibus, vel aliis rebus de quibus hujusmodi customa ad opus ipsius regis hæredum et successorum suorum dari non debent, carcatae in dictam*

Etum portum et aquam venientes (propriis navibus ipsorum hominum et tenentium villarum Parvæ Fernemuthe et Gorleston. hæredum et successorum suorum, tantummodo exceptis) apud eandem villam Magnæ Fernemuthe, et non alibi discarcentur, et per manus bona res et mercandisas hujusmodi ducentium vel deferentium et ibidem vendere volentium, seu per manus servientium suorum, venditori exponantur, et ibidem quibus voluerint liberè vendantur et emantur, absque aliquo forstallamento vel quovis alio impedimento. Quod præfati homines et tenentes dictarum villarum Parvæ Fernemuthe et Gorleston, hæredes et successores sui, proprias naves suas bonis rebus et mercandis suis, sive de allece, sive de aliis piscibus, aliis rebus quibuscunque carcatis, de quibus hujusmodi customæ dari non debent, ad prædictas villas Parvæ Fernemuthe et Gorleston, vel alibi pro voluntate suâ discarcare, et bona res et mercandisas hujusmodi venditioni exponere, et aliâs commodum suum inde facere solebant, absque impedimento ipsorum burgensium et hæredum suorum quorumcunque: ita tamen quod iidem homines et tenentes dictarum villarum Parvæ Fernemuthe et Gorleston, hæredes et successores sui, colore premissorum naves aliorum suas proprias esse non advocent quovismodo in præjudicium dictorum burgensium, hæredum vel successorum suorum; quod si facerint, et inde modo legitimo convicti fuerint, bona res et mercandisas in navibus sic advocatis seu advocandis inventa, si de assensu et voluntate dominorum eorundem bonorum rerum et mercandisarum advocata fuerint, domino regi et hæredibus suis forisfacta remaneant; et si de assensu hujusmodi dominorum tales operationes fiant, nihilominus hujusmodi advocantes versus dictum dominum regem et hæredes suos graviter puniantur.

provision for the liberties of the cinque ports, Norwich, and London, and a security provided for both places to keep the order.

this is the substance of this award and judgment, which shall afterwards enforced with a concurrent order of the king and his counsell. Pat. 6. E. 3. par. 2. m. 19.

this determination I have thus at large transcribed, because it is most consonant to justice.

The king's right for his customs is preserved; for in it is most plain, that Great Yarmouth was always the place where the king's customs were answered.

The right of the tenants and inhabitants of Little Yarmouth, which they had for their own shipping by constant prescription, is prescribed, that for their customable goods they shall not be charged with the port-duties belonging to Great Yarmouth, and for goods not customable they shall not be enjoined to bring them up.

3. The right of franchise for the lord of the port of Little Yarmouth is not at all taken care for, as in reference of the king had the port of Little Yarmouth when he granted privilege to the port of Great Yarmouth, and he might have gate from his own interest.

But yet the burghesses of Great Yarmouth rested not. They were a great and considerable port, and had great influence at court. Therefore in E. 3. a great precinct of the land called Kirkley-road, being five miles in the main sea, was annexed to the port of Great Yarmouth, and a new clause added to the charter, that no herring should be unladen or sold within seven miles of the port of Great Yarmouth during their fair, or in Kirkley-road; and it appears, that *Hil. E. 3. B. R. rot. 14.* divers persons were impleaded for unloading and selling of herring, contrary to the tenor of the charters.

This alarmed the country; and thereupon, *Rot. Parl. E. 3. n. 49.* the charter as to Kirkley-road is repealed by act of parliament, *come chose fait contre common profit de royaume* saving to them their other privileges granted or confirmed by the king or his progenitors with the clause *de licet, &c.* afterwards in the same roll, *n. 76.* so much of the new charter as concerned the sale of herring within seven miles of Great Yarmouth at the time of their fair, is likewise repealed, saving their other liberties.

Rot. Parl. 2. R. 2. p. 2. n. 80. their franchises concerning Kirkley-road and the sale of herrings is again revived by act of parliament, according to the charter of king E. 3. notwithstanding that repeal, with some small qualification as to the sale of herring.

Rot. Parl. 4. R. 2. n. 39. Upon a new complaint concerning the revivall of those repealed liberties by act of parliament a commission is to issue to enquire touching the inconveniences.

But *Rot. Parl. 10. R. 2. n. 23.* the commons in the borough of the town of Great Yarmouth desire, that the king in parliament would grant and confirm unto the town the franchise and liberties granted to them by the king's progenitors and confirmed by the king, according to the form and effect of them. The answer is, *Le roy le voet, nient contristeeant aucun de peale ent fait devant ces heures; par vieu tous voys, que tous marchans de gents, ci bien aliens, come tous les liges de roy, qui vendront pur vender ou acheter herring illongue pourront franchement paisiblement vendre et acheter herring deins le dit vill et port sans mesme herring ent carrier à leur volunt durant le faire sans grievance ou disturbance de aucun.* *V. 31. E. 3. stat. 2. cap. 35. E. 3.*

And thus I take it the state of the liberties of the port of Great Yarmouth stands at this day upon the foot of a charter

tion by act of parliament; whereby many of those liberties, which were not by law grantable by the bare strength of a patent or charter, yet having the strength and confirmation of parliament, stand good and effectual.

But this confirmation did not derogate from that agreement, it was settled by the consent of the king and the parties concerned, of the 5th of E. 3. before mentioned. But I think this day the port of Little Yarmouth and Gorleston are added unto the port of Great Yarmouth, and so all the business settled by that means, if not sufficiently settled before. *are tamen*, how that port of Little Yarmouth stands at this

And thus I have done with the narrative of the differences between Great Yarmouth and Little Yarmouth, and how they were settled; and likewise the proceeding which the liberties that port had; whereby it doth appear, that, although the king might grant a concurrent liberty of a port, yet he could not by charter without an act of parliament grant such restrictions that might be prejudicial to a liberty antecedently granted by charter or prescription in others, nor restrain the liberty of buying and selling out of the precincts of a port without the help of an act of parliament. But how far forth the king might have been restriction of some kind of commerce within the precincts of a port, shall be seen in the next chapter. I come now to the narrative of the port of Kingston upon Hull, the application whereof will clear up and prove some of these differences, which are expressed in the beginning of this chapter.

The case seems to be thus:

The town of Beverly was anciently part of the endowment of the archbishop of York from the time of king Athelstane, appears *Rot. Parl. 3. H. 5. par. 1. n. 48.* where the old charter of king Athelstane is recited: "As free make I thee, heart can wish or eye can see." This town bordering upon the sea had a small port belonging to it, and the archbishops claimed a great portion of the mouth of Humber and the river of Hull, as belonging to that manor and port, viz. from a certain place antiently called Amet to the streams of Humber. The ancient kings of England granted to the archbishops *ius suus*. And antiently by those words, they claimed only the first taste and buying of wines in the port of Hull, after the king's prisage was answered. But in process of time they began to claim the prisage itself, till judgment given against them in a *quo warranto*. *M. 6. E. 3. 51. Vide Claus. 7. E. 3. 1. m. 17.*

But besides this liberty, it seems, he claimed and also exercised some port-jurisdiction and privileges, as will appear in the following, and kept a bailiff constantly in that water for the watching and preserving of his rights and jurisdiction.

The abbot of Meux was seized of a certain ville bordering upon the sea called Wyke; which being convenient for a port or haven, king E. 1. took in by exchange and enlarged the watercourse adjoining to it called Sayer Creek, and made it a convenient port for the arrival of ships, and built a town there, which he called Kingston; and to this day is called Kingston upon Hull.

*See Comp.
Rep. 102.
The case
of Mayor
of Kingston
upon Hull
v. Horner
B. 1174
4 port
Duties.*

Between the port of Kingston upon Hull and the bailiiff's there, and the archbishop of York and his bailiiff the port of Beverley and the water of Hull; there grew great differences; and in the time of E. 2. the town of Kingston procured a mandate from the king, *ne qui mercatores cum mercandis per aquam usque villam prædictam venientes, bene in navibus, antequam ad terram venerint, particulatim vendere presument.* Thereupon, Rot. Parl. 8. E. 2. m. 16. the archbishop complains in parliament, and desires, that that mandate should be revoked, as prejudicial to that right which he claimed in the water of Hull as belonging to him. And on the other side the town of Hull complained against the archbishop's bailiiff, as usurping in that water prejudicially to the port of Kingston. All that I find done was a mandate directed to the archbishop's bailiiff, reciting both petitions, commanding the bailiiffs of the archbishop, *quod desistant super eadem in brevi illo juxta tenorem ejusdem, alioquin quod sit coram rectorum diem ostensari, quare non fecerint, quem diem rectoribus burgensibus antedictis.* After this, in 6. E. 3. fol. 51. a warrant is sued against the archbishop, *ut supra*, for his taking of prisage of wines in *aquâ de Hull*, and judgment given against him, *ut supra ostenditur.*

In 5. E. 3. the king by charter granted the borough of Kingston to the burgesses of Kingston, and their successors, at the yearly fee-farm rent of 70l. *una cum feriis mercatibus et aliis consuetudinibus, ad eò integrè, sicut dominus progenitores sui burgum prædictum hæcenus tenuerunt.*

M. 44. E. 3. B. R. rot. 24. Ebor. The archbishop brought a special action of trespass against the burgesses of Kingston, *quod ipsi impediverunt ipsum tenere et percipere libertates legia tolmeta et proficua infra totam aquam suam de Hull Kingston super Hull, à quodam loco vocato Amet usque stream Humber, viz. habere deodanda, cognitionem coram balliivo aquâ prædictâ de omnibus transgressionibus conventionibus et capitulis, inter mercatores et marinarios vel alios in eadem aquâ, gentibus, et excusationes et amerciamenta inde, et mensuram mercandis mensurabiles in aquâ prædictâ, scil. blada carum per bussellum ipsius archiepiscopi ad hoc antiquitus deputat. et pro quâlibet nave naviculo seu batello hujusmodi mercandis ferentibus, cum sic fuerint mensurati, quatuor denarios; et quod omnes mercatores, cujuscunque conditionis existant, per aquam*

nam liberè mercandisas suas illic adducere possunt, et ibidem pacificè
vari, quousque ea, cuicunque illa emere voluerint, vendiderunt per
unitatem suam, absque compositione alicujus mercandisas illas alibi
vendes, sine tolne to muragio aut alià consuetudine vel solutione alicui
quam præfato archiepiscopo præstandà, sic ipsi vi et armis abstule-
rent quendam batellum, scilicet, per ballivum suum, et deodand. &c.
etiam impediverunt tenere placita conventionis in curià suà, et minati
ballivum suum, et officarios suos impediverunt mensurare blada
ea, &c. per bussellum suum, et levare q. d. de quâlibet nave, &c.
compulerunt diversos mercatores illis solvere varias pecuniarum
mas.

The defendants set forth and shew their grant in fee-farm of
5. E. 3. and that the place, where the archbishop claimes
the liberties and supposeth the trespass, is called Sayer Creek,
which is parcell of the ville and within the borough of Kingston;
and intendunt quòd rege inconsulto. The archbishop saith it is
his parcell, et quòd villa prædicta vocabatur le Wyke,
fuit in seisinâ abbatis de M. su, et quòd dominus Edwardus avus
suis fecit excambium cum prædicto abbate de prædictâ villâ de Wyke,
cum aliis terris, ad quod tempus idem avus misit Petrum de
Spana pro extentâ inde faciendâ et quòd in eadem extentâ nihil
pertinet de aquâ prædictâ esse pertinentia dictæ villæ, nec par-
te ejusdem villæ, &c. and so would counterplead the aide of the
king's bailiffs. The court awarded, quòd non procedatur rege in-
sulto. Afterward a procedendo came. Then the mayor and
aldermen plead as to the deodand, and they demand judgment,
whether he shall make title without a charter, and as to the rest
viz.

quòd archiepiscopus est dominus villæ de Beverlaco, ad quam qui-
dam villam pertinebat aliquo tempore quædam applicatio batellorum
horum hujusmodi minorum vasorum, de quibus dominus archi-
episcopus cepit custumas tolne, &c. quia fuit dominus soli ex utrâ-
que parte aquæ, et quòd naves applicabant ad quendam locum vocat.
male, et quòd postquam dominus rex Edwardus avus excambiavit
præfato abbate de Meux pro prædictâ villâ de Wyke, edificavit
in illo de vicariis et bercariis quendam villam ibidem et illam
pari fecit Kingston, infra quam villam est quidam cursus aquæ,
vocatur Sayer Creek, et est bunda inter dictam villam de Dry-
burgh, quem quidam cursum aquæ idem dominus rex avus ad meliora-
rem remotionem et pontium in eodem cursu ex-
cavit, et ibidem quendam portum fecit, et ad opus suum capere
diversas custumas et alia proficua de diversis bonis et mercan-
diis in eodem partu provenientes, et postmodum per cartam suam
prædictam villam in liberum burgum, et homines ejusdem villæ
burgenses, et eis concessit diversas libertates, &c. Et dicunt,
quòd prædictus cursus aquæ et prædictus portus sunt pertinentes ad
burgum prædictum et parcella burgi prædicti, et sunt idem locus ubi
archiepiscopus modò queritur transgressionem prædictas sibi
fieri;

fieri; ac eò quòd archiepiscopus per ministros suos capi fecit in portum prædictum diversa tolmeta et custumas à diversis mercatoribus de mercandis eorum ibidem exigerunt, per quod dicti mercatores de mercandis se retraxerunt in damnum et præjudicium libertatis burgi idem mayor et ballivi dictos ministros archiepiscopi impediverunt non permississent ipsos capere proficua prædicta, prout his bene licet absque hoc quòd ipsi impediverunt ministros archiepiscopi in alio loco quàm in Sayer Creek, &c.

The archbishop maintains, that he and his predecessors have been in seisinà de prædicto loco de tempore cuius, &c. And the mayor and burgesses reply, quòd non fuerint in seisinà de tempore quo, et de hoc ponunt se super patriam; et archiepiscopus similiter.

Several continuances there are upon the roll, but no verdict given, as I can find. Possibly it was not prosecuted; for the port still enjoy their liberty. But upon this record these things are observable:

1. The original of one of the most eminent ports in England viz. Kingston upon Hull.
2. That a subject may by prescription and usage have a considerable precinct of a haven of the sea, as well in point of interest as jurisdiction; for otherwise an issue upon the fact would have been taken: for as this was a business of great moment, consequently much care taken both by the counsell of the king, also by the counsell of the town that no advantage should be lost to the law and pleading were at this time in the greatest height that ever it was; and as much may be collected upon the pleading at this time as at any time, especially in a case of so much moment and importance.
3. That a subject by prescription and usage might have a free arrival of vessels, as here the archbishop had at Beverley.
4. That yet the king might erect a port within a small distance from the port that was there before, and so settle a concurrent liberty of a port; for Kingston is but a small distance from Beverley.
5. That though the port of Beverley were but a small port for small vessels, which might perchance with more ease apply themselves at Kingston; though this erection of a new port had concurrent jurisdiction, as I may call it, with that of Beverley yet it doth not, neither can it, take away that liberty, which by prescription was lodged both in the archbishop in point of jurisdiction, and in the inhabitants of Beverley in point of custom and use.
6. That although possibly there might some customable goods come up to Beverley in small vessels, yet without the help of

of Parliament that could not be restrained by the erection of new port by the king.

And herein the difference appears between this case and that of Yarmouth before. For in the case of Yarmouth, the whole port declared to be belonging to Great Yarmouth, as a port which is such time out of mind. But here the port of Kingston was fine to that of Beverley, and so might not derogate from that port, which was anciently settled there, by any restriction.

But then it may be said, what remedy had the king to secure customs, if he could not constrain the merchant to come to port?

Answer,

1. Though he could not constrain the merchant from going to the port of Beverley, yet he might and did restrain him from going by parcells upon the water within the port of Hull; for that, as shall be shewn, is against the privilege of a port, to be established in such manner upon the water.

2. Though the port of Beverley belonged to a subject in point of franchise and propriety, yet the king hath his *jus regium* in that port, in order to the securing of his customs, and might place a searcher there, or other officer, for the securing of his customs.

3. There was yet a harder tie upon the merchant; for if he loaded or laded his goods, the custom not paid, there was a forfeiture. Therefore it concerned him to resort to that port where the king's officers of his customs were settled, there to pay or compound his customs, and obtain the warrant of the cocquet, which is only kept where the king had a collector and comptroller of customs settled; and when he had that cocquet he was at liberty to land where he pleased, either at Kingston or Beverley; and by this means the king's duty was secured, and the right and liberty of the merchant and archbishop provided for and saved.

But as to the landing of goods inward the statute of 1. El. cap. 1. and as to lading of goods outward the statute of the staple which is in force, did alter the liberties of ports exceedingly; whereof hereafter.

And thus much shall serve touching the creation and erection of ports. I shall now descend to the consideration of those *jura portus*, or *portatica*.

C A P. VI.

Touching the threefold right in ports, viz. jus privatum, jus publicum, and jus regium.

AND first of the *jus privatum*.

HAVING now considered the originall of sea-ports, I come to the several rights, that are to be found, and observed, and carefully distinguished in the consideration of publick sea-ports.

In all publick sea-ports in England, there are three kinds of rights that meet; and though they are distinct one from another, yet they consist one with another, whether the ports belong by point of franchise or propriety to the king or to a subject.

I. *Jus privatum*, interest of propriety or franchise.

II. *Jus publicum*, the common interest that all persons have resort to or from publick ports, as publick sea-marts or markets with their goods, and wares, and merchandizes.

III. *Jus regium*, or the right of superintendency and prerogative, that the king hath for the safety of the realm, or benefit of commerce, or security of his customs.

Of these severally and largely; and in this chapter I shall make an introduction at least into the *jus privatum* that is to be found in publick ports. And this *jus privatum* takes in these several branches:

(1.) The right of the lord or owner of the port.

(2.) The right of those that have the propriety of the shore contiguous to the port.

(3.) The right of the town, or *ville*, that is the *caput portus* and the inhabitants thereof.

(1.) As touching the first of these, the right of the lord of the port, we have before shewn, that, though of common right the king is *primâ facie* the owner and lord of every publick sea-port, yet a subject may by charter or prescription be lord or owner of it; and therefore I shall not again repeat that matter.

This ownership, that the king *primâ facie* hath and a subject may have, is of two kinds; and sometimes, and most commonly, they concur in the same person; but they may be divided, viz. the interest or ownership of propriety, and the ownership of franchise.

The ownership of propriety is, where the king or common person by charter or prescription is the owner of the soil of a creek or haven where ships may safely arrive and come to shore. This interest of propriety may, as hath been shewn, belong to a subject. But he hath not thereby the franchise of a port; neither can he so use or employ it, unless he hath had that liberty time out of mind or by the king's charter. Indeed he may bring thither for his own private use his own boats and vessels to carry off and bring in his own goods that are not customable, as fish, &c. but he may not use it as a publick port or admit foreigners unless in case of necessity, nor take toll or anchorage there; for that is fineable, either by presentment, or in a *quo warranto*, as hath been shewn.

The ownership of franchise. This is that, which is the formality or denomination of a publick or lawful port, and becomes a free arrival of ships to lade and unlade goods and merchandises; and this may be acquired by prescription, or by creation by the king either by proclamation or by charter.

Before any port is legally settled, although the propriety of the soil of a creek or harbour may belong to a subject or private person, yet the king hath his *jus regium* in that creek or harbour; and there is also a common liberty for any to come and go with boats and vessels as against all but the king.

And upon this account, though *A.* may have the propriety of a creek or harbour or navigable river, yet the king may reserve there the liberty of a port to *B.* and so the interest of propriety and the interest of franchise several and divided. In this no injury is at all done to *A.* for he hath what he hath before, viz. the interest of the soil, and consequently the enjoyment of the shore and the liberty of fishing; and as the creek was free for any to pass in it against all but the king, it was *publici juris* as to that matter before, so now the king takes off that restraint, and by his licence and charter makes it free for all to come and unlade.

But if *A.* hath the *ripa* or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa* without his consent, unless custom had made the liberty thereof free to all in many places it is; for that would be a prejudice to the private interest of *A.* which may not be taken from him without such consent.

And therefore, in the creation of a new port either by proclamation or charter, it hath been the course to secure the soil of the shore beforehand for the building of wharfs and for the application of the merchandize, and for the building

building of houses of receipt, as we see was done in the case of Hull.

So that it is possible, though not ordinary, that the interest of propriety and the interest of franchise may be divided; but it is usual and best in conjunction.

Now from this *jus dominii* of property or franchise, or both, there arise several port-duties, sometimes called *portatica*, sometimes tolls, sometime customs; and these are of two kinds,

Such as are common or ordinary, and so almost incident to every ownership of a port:

Or such as are by special usage or prescription.

Touching those of the former sort such are,

Anchorage, or a prestation or toll for every anchor cast there; and sometimes though there be no anchor. And it doth in truth properly and *primâ facie* arise from or in respect of the propriety of the soil, and is an evidence of it. But it is not so always, but grows due in respect of the franchise for many times where the shore of a harbour belongs to a private lord or owner, yet if at full sea a ship lets fall an anchor upon that place, the king or lord of the port in possession of franchise hath usually the anchorage; as I know it has been used in the harbour of Plymouth, where yet some lands adjacent have the soil of the shore in some places to the low water mark.

Ballastage of ships, or a toll for liberty to take up ballast of the bottom of the port. This ariseth from the propriety of the soil. The liberty in the Thames is granted by the king to Trinity-house without any toll for the same. And of this sort are also the ballast shores for the unlading of ballast, commonly built within the high-water mark, especially at Newcastle.

Touching the second, the *port duties*, that may be due to the Lord or owner of a port by custom or prescription, are various, and many times differ in several ports; as namely,

Busselage, such as appears to be claimed in the water of Humber. And such were usually answered to the king and duke of Cornwall in the port of Plymouth.

Keelage, viz. for every vessel coming within the port a certain toll. Such was that custom due to the king, viz. *de libertate batello cum remigio quatuor denarios, et de minore navis unum denarium*; as appears in the record of the case between the town of Newcastle and the prior of Tinmouth, 20. Hen. 3. hereafter more at large set forth.

Certain other tolls, called, *average*, *primage*, and *loadning*, mentioned in divers records. And of this kind are those duties that are taken in the port of Exeter, under

*Liberty of
ballastage
is meant*

g's grant of the fee-farm of that port and city, called petty
toms, viz. certain small rates upon merchandizes import-
which have been usually paid there. See the decree as-
ing the same, *M. 15. C. 1. in Scaccario* hereafter menti-
ed.

Lestage, that were port duties of goods unladen. *M. 21.*
1. C. B. rot. 89. *Lestage* in Lynn, of goods imported be-
ging to Thomas Hanvil.

Prisage, not that ancient *prisage* due by prerogative to the
own, whereof hereafter, but certain customary prises of
wines, wood, rushes, &c.—Thus in the port of New-
le it appears by the record before mentioned, the king used
have of every ship laden with herrings, 100 herrings freely;
And a ship laden with haddocks, 100 haddocks for six-pence;
every ship laden with some other kind of fish, the best fish
a penny.—And these prises were often taken by the consta-
of the king's castles in those ports, in right of the king,
by some title derived under him by grant or prescription.
H. 13. E. 1. B. R. rot. 2. *Bristoll*, an inquisition setting
th, *quot friscos pisces quilibet batellus applicans apud Bristoll*
friscis piscibus debet reddere constabulario castri Bristoll. Vide
munia Mich. 3. E. 3. in Scaccario.—The constable of the
wer of London used to take to the use of the king of
y fisher-boat of London fishing for spratts in Thames,
shillings and eight-pence, of every foreign fishing-boat
at shillings; and he used to take for his own fee, of every
el laden with smelts coming by the postern gate of the
wer 100 smelts for a penny; and so for ships laden with
ers, herring, firewood, rushes, &c. a certain proportion
orth in the record. *Vide stat. Magna Cart. cap. 19. 36. E.*
cap. 2. &c.

And these kinds of duties were sometimes called tolls, some-
es *consuetudines*; touching which, when they were in the
g's hand, not lodged in a subject by grant or prescription,
king by his charter might, and often did grant discharges,
well as of other inland tolls. But when they were before
ged in a subject by grant or prescription, the king could
discharge these by his charter; and by this we may the
ter understand those ancient charters. *Vide Cart. Antiq. E.*
n. 8. the grant of *R. 1.* to the abbots of Peterborough to
quit of all toll in *foris et nundinis et omni transitu pontium*
is et portuum maris: the like, *ibidem, L. 11. 26.* by Hen.
to the abbot *de loco Sancti Edmundi*, to be quit of toll in
ibus foris et nundinis, et in omni transitu pontium vidrum et
is per totum regnum; and in some cases to be quit *de omni*
consuetudinibus, in tide and of tide, by strand and by stream,
which are not intended of customs properly so called,
ch is the business of the third part of this book.

But

But of those customary tolls, *vide* fir John Davis's Report fo. 8. concerning the latitude of the word *customa* and *consuetudo* in the king's grant.

And thus much shall serve touching the interest of propriety and franchise in the very port, viz. that part of the sea wherein ships come to unlade their goods.

(2d.) There is a second interest considerable, viz. the interest of the shore adjacent to the port. Though it is true is rare to find any port, but that the king or the owner of the port in point of franchise hath such a convenient portion of the shore and land adjacent, where wharfs and keys and ware-houses may be built, for the lading and unlading and safe-guard of merchandizes; yet the interests are and may be divided, however they are several in their nature; and the duties that arise by reason of the goods when unladen and on shore, or in relation thereunto, are different from those that have been before spoken of. And many times it is found out, that such a place within a port may be of great convenience to make a common key or wharf where the property of the soil may belong to a subject, whereby either his interest must be bought in by the lord of the port, or he must be content with those benefits that may arise by the taking or landing of merchandise.

Now touching the rights that happen by reason of this interest in the shore, they are very many and various, according to the various concerns unto which they relate.

These shore-duties, as I may call them, will be considered in the natures and names of the things themselves:

In the title or means whereby they grow due.

Touching the former of these, the names and natures of the duties themselves, they are various.

1. *Towage*, or something due for the liberty of vessels to the port.

2. *Moreage*, a sum due by usage for moreing or fastening ships to trees or posts at the shore.

3. *Terrage*, for the necessary unlading of goods before they come up to the common key.

And of these I shall deliver at large, when I come to the consideration of *jus publicum*.

4. *Cranage*, or duty for the taking up or lading on any goods or merchandize by that engine.

5. *Wharfage* or *keyage*, a toll or duty for the pitching or lodging of goods upon a wharf.

6. *Houfcellage*, or a toll for the use or liberty of ware-house room.

7. *Tolls*, or duties for weighing merchandize; which

Either *Tronage*, which was the king's duty for the weighing of wooll at the king's beam in all ports wherein woolls were exported; whereof at large when we come to the customs:

Or *Pesage*, which was for the weighing of other merchandise of averdupoise. Of this also when we come to the customs.

8. *Measurage*, which was a toll due for the use of a common shell or other instrument to measure dry or wet goods imported or exported.

Many more of this nature we may find, some whereof are mentioned *Rot. Parl.* 50. E. 3. n. 163. where a petition is made against inhancing of them.

Thus much shall serve concerning the duties themselves, their names and natures.

Now concerning the title whereby they may accrue, which is of three kinds:

First, Convention or agreement:

Secondly, Prescription or custom:

Thirdly, Charter or grant.

First, touching conventional duties, and how and where they may be taken, I shall deliver in these ensuing positions.

1. As we have before observed, no man can erect a new publick port without the king's licence; neither can he take of a port any certain constant rates for the lading of merchandizes, but he may make particular agreements with any one that comes there by his consent to land his goods.

This was resolved, *P. 11. Car. B. R.* in Morgan's case, for taking two-pence for every barrel of beer landed at Crockham pill, for which constant taking he was fined 100 marks.

2. A man for his own private advantage may in a port set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, &c.; for he doth no more than is lawful for any man to do, viz. makes the most of his own. And such are coal-wharfs, and wood-wharfs, and timber-wharfs, in the port of London and some other ports. But such wharfs cannot receive customable goods against the provision of the statute of Eliz. cap. 11.

3. If the king or subject have a publick wharf, unto which all persons that come to that port must come and unlade or load their goods as for the purpose, because they are the wharfs licensed by the queen, according to the statute of 1. El. cap. 11. or because there is no other wharf in that port, as it shall fall out where a port is newly erected; in that case there shall not be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c. neither can they be inhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's licence or charter. For now the wharf

wharf and crane and other conveniences are affected with publick interest, and they cease to be *juris privati* only; as a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected with publick interest.

4. But in that case the king may limit by his charter, and license him to take reasonable tolls, though it be a new port wharf, and made publick; because he is to be at the charge to maintain and repair it, and find those conveniencies that are fit for it, as cranes and weights.

Secondly, the duties that arise upon *ripa* or wharf by prescription.—Thus in many and almost all ancient ports are duties and tolls above-mentioned, viz. crannage, wharfage, housellage, &c. which are settled by long usage and prescription; and the sums, which are to be paid for the same, are limited; and sometimes those remain in the king or lord of the port, sometimes and most commonly granted to the town, that are the *capita portuum*, and they become parcell of the town farm, as it is at this day in Newcastle, Kingston upon Hull, and other places. *Vid. stat. 33. H. 8. cap. 33. pro consuetudinibus in Hull.*

All that I shall need to add concerning this is, that the duties settled in ancient ports by prescription ought not to be enhanced, nor enlarged beyond their usual rate or number; for it is part of that *jus publicum* that is vested in the commonwealth to have their access thither as freely as formerly was. *Vide Rot. Parl. 50. E. 3. n. 163.* Upon complaint of the enhancement of ancient tolls, and the accroaching of new in the port of London by the king's officers, the answer is, *Il n'est au roy que les auncient custumes y soient tenus, et nul novel imposition y soit mise.* And such an accroachment is punishable by indictment by fine and imprisonment; for it was one of the articles in Eyre, as hath been formerly said, *de novis consuetudinibus levatis in regno, sive in terrâ sive in aquâ, et quis eos levaverit et ubi.*

Thirdly, the third sort of port-duties are by patent, which is accidentall, occasional and temporary; as where there is necessity to build a new key, or to repair the old, it hath been usuall for the kings of England to grant temporary and reasonable tolls of all ships and merchandizes coming into the port, expressing the particular sums that are to be taken in the patent: and the like hath been done for the building of a new wall about the port town, or the repairing of the old, called *murage*; for in those, and in cases of the like nature, the subject hath *quid pro quo*; and it is to cease, when the business is done; and infinite instances of this nature may be given in all ages.

(3.) I come to the *jus privatum* of the *caput portus*, or port-town, which is the port-town. And here I shall not take in the liberties which a port-town may acquire, either by the king's

arter, or by prescription, or by act of parliament, for these
may be various as well in port-towns as inland towns; but
those liberties or rights that seem incident to a port-town *quâ*
And some indeed are common to every port-town, which
this; that every port-town, if they be able, should furnish
the provisions for the ships and mariners that come to that
port; and that there should be no forestalling of the port,
either by interloping with provisions, or by new buildings be-
tween them and the sea, which may withdraw the resort of
mariners from the port-town, and possibly also deceive the
king of his customs: and I shall proceed with instances herein.
Pat. 14. E. 1. m. 22. *Pro hominibus mercatoribus de Ravensfroad.*
Rex omnibus ad quos, salutem. Quia accepimus per inquisitio-
nem, quam per dilectum et fidelem nostrum Thomam de N. escaeto-
rum nostrum. ultra Trentam fieri fecimus, quod homines mercatores
de Ravensfroad bene et sufficienter possunt invenire omni tem-
poris anni, omnibus et singulis ad villam illam confluentibus, bonum
et bonam cervisiam secundum assisam nostram inde provisam,
hoc parati sunt facere, et nulli de esse; et quod extranei, in
predictâ villâ de Ravensfroad non residentes, cupiditate ducti, pa-
nam et cervisiam in navibus ad vendendum ibidem adducunt in ipso-
rum hominum et mercatorum nostrorum dispendium, et status sui et
de predictâ deteriorationem maximam, et contra consuetudinem
usmodi villarum super mare situatarum: nos, indemnitati homi-
num et mercatorum nostrorum provideri volentes in hac parte, con-
cedimus eis, quod nullus extraneus panem vel cervisiam in portu vel
in mari juxta predictam villam de Ravensfroad contra voluntatem
mercatorum nostrorum predictorum vendere presumat; et
vobis mandamus, quod aliter contra voluntatem hominum et
mercatorum predictorum, quantum in vobis, est, fieri non permit-
ti. T. R.

But this perchance may be too hard; and indeed it is not
to conclude every thing to be lawful, which may be found
in writs and commissions of like nature in former or after times.
I come therefore to judicial records; and begin with that
able case, which I have had occasion formerly to mention,
the suit between the town of Newcastle, in the behalf of
the king and themselves against the prior of Tinmouth, which
was in parliament the 20. E. 1. and was finally adjudged
the 20. E. 1. B. R.

It appears by the *Chartæ Antiquæ* G. 22. that king John
the 14th year of his reign, granted to his men of New-
castle, at the fee-farm rent of 100*l.* *salvis vobis redditibus et*
et assisus nostris in portu ejusdem villæ.

The prior of Tinmouth his land lay between the town of
Newcastle and the sea.

The burgeses of Newcastle, in the behalf of the king and
themselves, complain in the parliament 19. E. 3. wherein
is set forth,

I. Quod

*Charta
de Newcastle Town
p. Tinmouth Priory
see 196.
notices page
13.*

1. *Quòd rex habet et habere debet totum portum in aquà de Tine à mari usque ad locum qui dicitur Hidewin streames ita liberè, non licet alicui carcare vel discarcare mercandisas aliquas, nec stallum facere de huiusmodi mercandisis, emendo vel vendendo nisi infra villam Novi Castri, ita quòd rex tolmeta prisas et tumas et alia ibidem spectantia percipere possit.*

2. That the prior having his lands between Newcastle and the sea, ships did lade and unlade at the prior's lands, where there was no port before, and so forestalled the king's port.

3. That the king had common ovens or bake-houses at Newcastle, where all vendible bread was to be baked, and elsewhere.

4. That yet the prior had erected a new town at Sheles between Newcastle and the sea, and there had common brewers and bakers, whereby the king lost his furnage.

5. That the king had divers ancient prisages of fish and wine at Newcastle.

6. That the prior causing lading and unlading of ships at Sheles, the king loseth his prisage.

7. That the prior had erected common ovens at Sheles whereby those that were used to come to Newcastle to buy their provisions in emendationem ejusdem villæ, came not, but supplied themselves at Sheles.

8. That the prior kept a market at Sheles, and shambles whereby the country and mariners resort thither for provisions and buy and sell.

9. That there were certain monks at Tinmouth, that were traders in leather, and laded ships at Sheles for exportation thereof.

10. That whereas the king *debet habere towagium batillis majorum et minorum in aquà de Tine, ascendendo à mari ad Novum Castrum, et descendendo ad mare, liberè per terras dominorum eorumcunque; prædictus prior non permittit huiusmodi transitum eorum volentes terras suas ingredi; et cum fortè ingressi fuerint, compellit eos reverti et in aquam profundam gradari, unde vix cum suâ evadunt; whereby merchants and others withdraw themselves from the town, and do not bring up coals and wood and other things, to the prejudice of the town and damage of the king, who is used to have of every great vessell with four-pence, of every lesser a penny.*

To this complaint there are divers pleas and replication, but the short is,

The prior as to any market or port disclaimed, and the upon judgment given, *inhibitum est ei, nè mercatum vel portum in locis prædictis de cætero teneat, imò quòd omnimoda signa eorumcunque fuerint tam portus quam mercati in locis prædictis proferre faciat et diruere.*

As to divers other matters in question, he makes title and excuses; whereunto replication was made by the king's attorney.

quod dominus rex habebit totum portum à mari usque ad quandam
vocat. *Hidenam streames*, et quod nullus in portu illo possit
ire vel discarcare sine licentiâ domini regis vel ballivorum suorum;
quod portus ille remaneat domino regi et hæredibus suis liberè cum
et towagio et omnibus libertatibus ad portum spectantibus: ita
neque apud *Sheles* neque apud *Tynmuth* naves carcentur et wre-
maris, &c.

ne not, this great record, and the solemnity of the proceeding there-
of great weight and authority to evince, that it is against
d shamb liberty of a port to have any victualling-houses erected between
provisi e-town and the sea without the port-town, and within the
acts of the port; for it is a forestalling of the port-town, a
, that to them in their trade, a damage and prejudice to the king in
exportat customs.

City of
Portland
v. Morgan
in Excheq.
Chamber
J. H. Cha.
The attack
initiated on
relied on
in the
Yorport
case be-
tween
v. Rich-
ards in
the Exch.
J. S. 2. R.
then's Rep.

for erections upon the river of Tyne to the prejudice of towns.—That it appeared by the defendants answer, that the houses were erected at Crockham-pill for seamen to dwell in.—That the erections were between the sea and the town of Bristol, where entries were made, and the king's customs received.—That it is probable thereby the king's customs are stolen, and merchants goods embezzled; and it is confessed, that the inhabitants of those houses sell ale beer and other victuals in great abundance, which the court declares to be a manifest damage to the port of town of Bristol, and is against the custom of maritime and other towns, as by the record of Ravensroad appears.—That it appears by proof, that divers of the houses are built too near the river Avon; that the water flows up to the walls of the said houses, that men and mariners, in haleing their ships into and out of pill, are constrained to go between the houses and inclosures, the river in mudd and mire at high-spring tide, which is sufferable; that the port and river is much straitened and narrowed thereby; that men and mariners are drawn to idleness and intemperance by these, and so to neglect their labours, whereby ship may be lost, and the port thereby choaked.—That it appeared in proof, that the plaintiffs had used to fix posts at Crockham-pill for moreing of ships; and when those decayed they have fixed more at the pill, and elsewhere upon the river at their wills, without contradiction, untill the defendant Morgan opposed it lately.

It is therefore adjudged and decreed,

1. That but one house for the ferry or passage-boat shall be permitted to stand at Crockham-pill, as hath been formerly used, and no more.

2. That all other houses, cottages, and inclosures, made or procured by the defendants, or the father of Morgan, be pulled down and demolished at the charges of the defendants.

3. That no new buildings or inclosures be made there; the place shall be kept open and free for common and publick use, as hath been heretofore accustomed.

4. That the plaintiffs and all others resorting to the port of Bristol shall have free liberty for moreing and haleing of ships, as they have formerly used, and may pitch posts at all the said harbours, pills, places, and grounds, at their will and pleasure, for the moreing of ships and barques, as formerly they have usually done.

I have recited this case at large; because it is useful to the publick, which I have now in hand, and will be necessary to be remembered in what follows.

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ACTON

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upon these two records these things are to be noted and collected, viz.

De facto Crockham-pill, and that part of Tyne to which was contiguous, was within the respective ports of Bristol Newcastle, and between the port-town and the sea.

That an erection of houses, or places of receipt for maritime contiguous or near to the water of that port, between the port and the sea, is an injury to the port-town, a forestalling of and a prejudice to the customs.

That it may therefore be demolished by decree or judgment. That if it had not had these circumstances, it had been otherwise.

If it had been built contiguous to the port-town, it should have been demolished; and upon that account the buildings of the town do continue, and are not within the reasons of judgments.

If it had been built above the port, it should not have been subjected to such a judgment; for it is in that case no forestall between the port and the sea, and so no nuisance to the port-town as port-town.

If the building had been out of the extent of the port, as if it had been built three or four miles below the pill, it had not been within the reason of either of these judgments, nor might it have been demolished, for it could not be a nuisance to the port.

This decree, it is true, was pronounced; but the buildings were, possibly upon some composition between the parties, or in proviso for cottages near the sea, in the stat. 27. Eliz. And much for the *jus privatum*,

- 1st. Of the lords of ports,
- 2dly. Of the shore contiguous to the port,
- 3dly. Of the town or *caput portus*.

C A P. VII.

Concerning the jus publicum of ports and harbours.

ACTON, lib. I. cap. 12. s. 6. tells us, *quod publica sunt flumina et portus, ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes ibi natis religare, onus aliquod in iis reponere cuivis liberum est, sicut per ipsum fluvium navigare. Sed proprietates earum sunt particularium*

illorum est quorum prædiis adherent, et eâdem de causâ arboribus eisdem natæ eorundem sunt. Sed hoc intelligendum est de fluminibus perennibus; quia temporalia possunt esse privata. As concerning the publick right of common rivers, whether fresh or salt, enow has been said in the First Part. As touching ports, and the publick right of them, Bracton saith true; with this allay, hath been before observed, that the law of England doth thus abridge that common liberty of ports, that no port can be entered without the licence or charter of the king, or that which prescribes and supplies it, viz. custom and prescription.

But when a port is fixed or settled by such means, though the soil and franchise or dominion thereof *primâ facie* be in the king, or by derivation from him in a subject; yet that *jus private* is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested, by reason of common commerce trade and intercourse. And this publick right consists, among other things, principally in these:

1. They ought to be free and open for subjects and foreigners to come and go with their merchandize.—But touching this how far, and by what means, and upon what occasion there shall be interdictions in this kind, shall be at large considered in the following chapters.

2. There ought to be no new tolls or charges imposed upon them without sufficient warrant, nor the old enhanced; which was before in the precedent chapter.

3. They ought to be preserved from impediments and nuisances that may hinder or annoy the access or abode or recess of ships and vessels, and seamen, or the unlading or relading of goods. And touching this principally in this chapter.

Nuances of ports are of two kinds.

I. Such as are immediately only nuisances to the private concernment of the lord of the franchise of the town that is *caput portus*, though possibly in consequence may damnify the publick; such is that of building houses of receipt between the port and the sea; whereof in the former chapter. And because it doth immediately only concern a private interest, it may be dispensed with and continued by consent of the king and parties interested, as many of those interloping buildings between the town and the sea are continued; and namely, that of Crooked Pill, which is continued to this day, upon some terms proposed between the city and the owners of the houses.—These are the most common nuisances as purprestures, which were warranted by the king; at least with the consent of the port which was immediately interested in the consequence of

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largely.—

I. Such nufances as are common to all men that have oc-
 on to come, go, or ftay at ports. I will give instances of

1.) Silting or choaking up the port, either by the finking
 veffels in the port, or throwing out of filth or trafh into the
 , whereby it is choaked.

2.) Decays of the wharfs keys and piers, which are for the
 ing of merchandize and fafe-guard of fhipping.

3.) The leaving of anchors in the port without buoys or
 ks, whereby fhips or veffels may ftrike againft them and be
 ed.

4.) The building of new wears or inhancing of old, where-
 avigation or paffage of veffels is obftructed.

5.) The ftraightening of the port, by building too far into
 water, where fhips or veffels might have formerly ridden ;

it is to be obferved, that nufance or not nufance in fuch
 is a queftion of fact. It is not therefore every building

ow the high-water mark, nor every building below the
 water mark, is *ipfo facto* in law a nufance. For that

ld deftroy all the keys that are in all the ports in Eng-
 . For they are all built below the high-water mark ;

otherwife veffels could not come at them to unlade ; and
 are built below the low-water mark. And it would be

ffible for the king to licenfe the building of a new wharf
 ey, whereof there are a thoufand instances, if *ipfo facto* it

a common nufance, becaufe it ftraightens the port, for the
 cannot licenfe a common nufance. Nay, in many cafes

an advantage to a port to keep in the fea-water from dif-
 at large ; and the water may flow in shallows, where it

ffible for veffels to ride. Indeed, where the foil is
 ing's, the building below the high-water mark is a

refecture, an incroachment and intrusion upon the king's
 which he may either demolifh or feize, or arent at his

ure ; but it is not *ipfo facto* a common nufance, unlefs in-
 it be a damage to the port and navigation. In the cafe

fore of building within the extent of a port in or near the
 , whether it be a nufance or not is *quæftio facti*, and to be

mined by a jury upon evidence, and not *quæftio juris*.

6.) The impediment or hindrance of moreing of fhips in
 ground adjacent, if it hath been fo anciently ufed, with-

aying any thing for it. Or if it be a new port, yet it
 the moreing of fhips being for the general good of

erence, it muft be fuffered upon reasonable amends. See
 of this in the next.

7.) Towage or haleing of fhips or veffels up or down a
 or creek, to or from the port-town ; and of this fome-
 largely.—

ku 3. Thom
Rep. 253.
 I. It

1. It is clear by the judgment in the case of *Tinmouth* and the decree in the case of *Bristol*, above cited in the former chapter, that where this hath been customably without paying any thing for it, such a custom is good, ought to be allowed; for it is *pro bono publico*; and also but an easement, and therefore may be said to be belong to passengers or inhabitants, or generally to all come through the port. Look at the book of 8. E. 4. 18. for the custom of Kent, for fishermen to dry their nets upon the land, though it be the soil of private men.—*Pat. B. 1. part. 1. m. 83. Rex omnibus, &c. Ex clamorâ insinuatâ totius comitatûs Nottingham accepimus, quod cum diversi homines ducentes diversa victualia et mercandisas cum navibus et batellis per aquam de Trent, in singulis placeis inter villas de Hull et Nottingham, totis temporibus retroactis, venire per eandem aquam velando et navigando liberè redire, pro parvitate aquæ navibus batellos suos per lineas et cordas super terram ex utrâque ripa prædictæ trahere consueverunt, quæ quia aqua est communis vestra, et illo jure commune passagium pro cariagio et aliis necessariis in eadem aquâ faciend. pro quibuscunque hominibus transseuntibus, &c. quidam homines, habentes terras suas adjacentes dictæ ripariæ ex utrâque parte aquæ prædictæ, fines et redemptiones ac vadia singulis navibus et batellis venientibus ante hoc tempus ceperunt, et indies capere non desistunt per quod quamplures hujusmodi homines illuc venire dissolentur adhuc differunt; ita quod diversa victualia ad magnum commodum deveniunt, et quotidie deveniunt in villâ ac castro Nottingham totius comitatûs prædicti damnum non modicum gravamen et oppressionem manifestam: nos, hujusmodi damna gravissima et oppressiones vitare et communi utilitate populi nostri circumspicere volentes, vobis omnibus et singulis districtis, qui habitamus, sub forisfacturâ omnium quæ nobis forisfacere potest habemus, ne aliquos victularios, victualia et alias mercandisas villas de Hull et Nottingham per aquam prædictam per districtus in navibus seu batellis ducentes, impediatis, molestis seu in aliquo per fines redemptiones vadia vel alia gravamina contra justitiam inquietetis ullo modo, et hoc sub forisfacturâ prædictâ nullatenus omittatis.*—I have inserted the whole writ because it well explains the nature of this liberty of towage and accordingly, by the statute of the 23. H. 8. cap. 1. towage upon the river of Severn is declared to be free custom time out of mind used, and a punishment enacted against the exactors of toll or taxes for the allowing of toll.

2. But yet we must needs say, that without a recompence there may be something required as a recompence by the owner of the soil over which they go. But yet, it ought to have a liberty of paying for it. 2. They ought to pay what is reasonable, and no excessive exaction ought

taken for such permission ; for it is for the public good, and therefore ought not to be wholly obstructed ; and yet there is a private interest concerned, and therefore *de jure communi* without a special custom to the contrary, the owner of the soil ought to receive compensation for his damage. And this appears by the statute of the 19. H. 7. cap. 18. for the free passage of boats in Severn, and the proviso therein for the reasonable satisfaction of the owners adjacent ; but by the subsequent statute of 23. H. 8. it is declared and enacted the passage shall be free without compensation.

8.) A port or public passage may not be obstructed ; nay, if begins to be filted or stopped, yet it must be scoured, and not be wholly dammed or filled up, although another cut made as beneficial as the former, without an inquisition by writ of *ad quod damnum* finding it to be no damage to the public, and the king's licence thereupon obtained ; as appears the writ of *ad quod damnum* cited formerly to another purpose. Register 252.

These be some of those many nuisances which may happen in ports.—I proceed now to set down the means whereby they may be prevented or remedied, appointed or allowed by law. And these provisions are of two kinds :

I. By the common law.

II. By particular acts of parliament.

As to the provisions by the common law we are to observe, as the common law hath intrusted the king with the patronage and protection of the *jura publica*, as highways, public rivers, ports of the sea, and the like ; so the care of preventing and reforming of public nuisances therein is left to him, and his officers of justice, the prosecutions for them are in his name, and the fines for the defects or annoyances in them are part of the revenue.

By the common law the course touching nuisances in ports is of two kinds, provisional or remedial.

1.) The provisional courses to prevent these nuisances,

1. The king did many times issue out of the court of chancery mandates to the mayor and chief officers of ports to take care against them. *Vide in Cl. 46. E. 3. m. 14.* a mandate to the mayor and sheriffs of London, that *finis finaria et alia nociva ne proficiantur in rivum Thamisiæ, sed amoveantur in commendationem portus.*

2. The king granted upon occasion tolls for the repair of wharves in ports, called *keyagium*, viz. certain rates of all sorts of merchandize.

2.) Remedial ; and this may be done,

1. By the ports damnified.—Any man may justify the removal of a common nuisance, either at land or by water, because

because every man is concerned in it. *Vide Mich. 17. E. 1. B. R. rot. 10.* The burgesſes of Southampton juſt the throwing down of a wear belonging to the abbot of Tichford in a creek of the ſea, *quia levata fuit ad nocumē domini regis et villæ Southampton, et quòd battelli et naves indiantur quominus venire poſſunt ad portum villæ*; and verdict and judgment for the defendant: but becauſe this many times occaſions tumults and diſorders, the beſt way to reform public nuaſances is by the ordinary courts of juſtice.

2. By the king's courts,

1. If the nuſance be *infra corpus comitatûs*, the ordinary remedy is by indiſtment or preſentment in the king's courts, as in leets, turns, ſeſſions of the peace,oyer and tenners; and if the nuſance be where the king's bench is ſitting, then by preſentment there; if in another court, then upon the preſentment removed by certiorari into the king's bench, and proceeding thereupon, or by information by the king in any of his courts at Weſtmiſter. By the book of 8. E. 2. *Corone*, every arm or creek of the ſea within the *points* of the land, where a man can diſcern clearly from ſide to ſide, is within the body of the county. Yet the admiral hath uſed at leaſt a concurrent juriſdiction in many ſuch creeks and arms of the ſea, as to the fiſt bridges as to matter of nuſances, upon a ſtake perchanſe of the words *les points* in the printed ſtute of 16. R. 2. c. 3. whereas ſome read it *points*.

2. If not within the body of the county, but upon the high ſea, then theſe nuſances are rectified and redreſſed in the court of admiralty *ex officio*, as appears by the old ſtatutes of the admiralty in *libro nigro admirallitatis*.

II. Touching proviſions particularly made by act of parliament for particular ports, ſee the ſtatutes of 23. H. 8. c. 27. H. 8. c. 23. for the preſervation of the ports in Devonſhire and Cornwall, principally in reference to damages that may occur by tin-works; the ſtatutes of 4. H. 7. c. 15. & 27. H. 7. c. 18. for avoiding and reforming nuſances in the ports of London and river of Thames; 6. H. 8. c. 17. for the river of Canterbury; 23. Eliz. c. 6. &c. for Dover haven; 2. E. 6. c. 30. for the port of Rye and Wincheſſea; 34. H. 8. c. 9. for the port of Briſtol; 21. H. 8. c. 18. for the port of Newcaſtle; 11. H. 7. c. 5. & 14. 15. H. 8. c. 13. for the port of Southampton; 27. Eliz. c. 22. for the port of Chicheſter; 27. Eliz. c. 20. for the port of Plymouth; 23. H. 8. c. 4. for the port of Exeter.—34. 35. H. 8. c. 2. generally againſt unloading any rubbiſh into any haven or river. See againſt exactions in ports or navigable rivers, *Rot. 1. 50. E. 3. n. 163.*—19. H. 7. c. 18. & 23. H. 8. c. 12. againſt exactions upon Severn.

C A P. VIII.

concerning the *jus regium*, or the king's right of prerogative in ports of the sea.

HAVE done with the *jus privatum* and *publicum* of ports.—

I come to the king's right.

Touching the king's right of erection of ports, I have already declared at large, as also concerning his right of ownership, whether of franchise or propriety; for that right I call *jus privatum*, though it be lodged in the crown, because that dominion is transferable to a subject.

But the right that I am now speaking of is such a right that belongs to the king *jure prærogativæ*, and is a distinct right from that of propriety; for, as before I have said, tho' the dominion whether of franchise or propriety be lodged either by prescription or charter in a subject, yet it is charged or affected with that *publicum* that belongs to all men; and so it is charged or affected with that *jus regium*, or right of prerogative of the king, in as far as the same is by law invested in the king.

Now touching this *jus regium*, and what kind of prerogative the king hath in the ports of the sea, and how far they extend, they may be considered under these three relations:

I. How far forth the king's prerogative, or *jus regium*, extends, in order to the preservation of the safety and peace of the kingdom.

II. How far forth they extend in relation to the trade and commerce of the kingdom.

III. How far forth they extend in relation to the improvement and due answering of the king's customs and subsidies arising by merchandize imported or exported.

And this will let me into what I principally intended in this whole collection, viz. the narrative or history of the customs, which will be the subject of the Third Part of this Discourse.

And, first, I begin with the consideration of the *jus regium*, or prerogative of the king, in order to the preservation of the peace and safety of the kingdom, viz. inasmuch as the interests of the kingdom are the *januæ* and *ostia regni*, how far the king may by law open or shut these gates, in order to the peace and safety of the kingdom, or upon any surmise of any danger or inconveniency relating thereto. And as to this matter, I set down these things:

First,

First. What *de facto* was actually done in this kind :

Secondly, What might be done, as the laws and statutes of the kingdom stand.

And as to the former, the exercise of this power was of two kinds :

(1.) The inhibiting of persons to come into the realm.

(2.) The inhibiting of persons to go out of the realm.

As to the former of these, these things were usually done :

1. In time of hostility, there were frequent inhibitions by proclamation, that none of the nation in hostility should come into the kingdom *sine licentiâ regis speciali* and this was but reasonable and necessary.

2. Even in times of peace, yet there were many times inhibitions restraining great persons of a foreign kingdom to come into the realm. *Vide Claus. 20. H. 3. m. 13. dorso* mandates to the constable of Dover, the bishop of Canterbury, and the sheriffs of divers counties, *viz. Nolumus quod aliquis magnus, qui sit de potestate regis Franciæ, applicet terrâ nostrâ sine licentiâ nostrâ vel mandato nostro speciali et tibi præcipimus, quod non permittas de cætero aliquem magnatem, qui sit de ipsius regis potestate, applicare; et si contigerit, ei scire facias quod statim revertatur.* And upon this account, when the emperor came hither to visit the king of England, the historian tells us, that the earl of Gloucester ran into the water with his drawn sword, and withstood his landing, till he had gotten the king's licence to arms, because he was an absolute prince, and his access might cause disturbances here.

3. A kind of restrained inhibition, *ne intret in regnum Angliæ, secum deferens bullas, aut instrumenta, vel alia præjudicialia paci regni, vel juri regis.* And this was frequently done in cases of the pope's agents, that sometimes came with breves, interdictions, and other matters prejudicial to the king's interest and kingdom's peace. *Vide Claus. 15. H. 3. m. 18. dorso, pro de Eynsham, et alius pius alibi.*

But none of these inhibitions extended to merchants, unless in time of war. *Vide* the statute of *Magna Carta*, cap. 1. But in time of hostility, then merchants also of the hostile country were not only forbidden to come in, but sometimes commanded to depart out of the kingdom. *Vide Claus. 15. H. 3. m. 19. dorso*, a proclamation, *quod omnes mercatores de terra Franciæ exeant terram Angliæ* by a certain day.

Thus much shall serve touching the first kind of restriction. Now touching that other, *viz.* the restraint of persons for going beyond the seas. And such restrictions were often heretofore used, in order to the peace and safety of the kingdom, and they are of two kinds :

1. A general restriction, which was ordinarily in times of public hostility and danger; and when that was the true end and use of it, it carried its own reason with it, and so all men rested satisfied with it. But if at any time it were made an engine to gain money for licences, then it became distasteful, and brought inconveniencies.

The end of these inhibitions were, either the better to apprehend and discover spies, or to prevent the discovery of the councils of the kingdom to foreign states in hostility; or to prevent the supply of foreign states in hostility, either with money, ammunition, or discontented soldiers that possibly would go over to be entertained. These inhibitions *ne quis exeant regnum* were sometimes extended to all persons, and to all ports, not to pass over seas without the king's licence; as *Cl. 10. H. 3. m. 27. dorso. Claus. 11. H. 3. m. 25. dorso. Claus. 3. E. 3. m. 9. dorso.* Sometimes by such proclamations all ports were not closed, but some one or some few eminent ports, where possibly a great vigilance might be used, as Dover. *Claus. 3. E. 3. m. dorso, et sæpius alibi.*

2. A special restriction. Such is that by the writ *de securitate inveniendâ ne exeât regnum*, which concerns particular persons; and though at this day, this writ is granted upon oath made before the chancellor in reference to civil causes, yet certainly the original institution of this writ was in order to the safety of the kingdom, as appears by the suggestion of the writ; *quia datum est nobis intelligi, quòd tu versus partes externas absque licentiâ nostrâ clam destinas te divertere, et quamvis maxima nobis et coronæ nostræ præjudicialia ibidem prosequi intendis, &c.* which though it be not traversable, yet it is a good direction, what the end of that writ was, and how it ought to be used.

Thus far concerning the fact, what hath been used to be done in reference to persons.—It seems the law stands thus:

1. At common law any man might pass the seas without licence, unless he were prohibited: therefore much more might merchants.

2. But at common law, the king might by his writ prohibit a person particularly from going beyond sea without licence, by his writ of *ne exeât regnum*; and this may be done at this day. *Vide Fitz. N. B. fol. 85. Dy. 165. 269.*

3. At common law, in time of public danger, and *pro hac vice*, there might be a general inhibition by proclamation, restraining any from going beyond sea without licence.

4. But that was not to be made an engine to gain money, but to restrain trade; but licences of right ought to be granted to

to persons upon whom there was no just suspicion. Otherwise it was an injury to the people. And hitherto those several petitions and concessions in parliament tend, viz. *que mere soit overt. Vide Rot. Parl. 18. E. 3. n. 10.—22. E. 3. n. 8. 25. E. 3. n. 22.* And by the opinion of Fitzherbert *N. B. 85.* this power still remains, viz. in case of public danger, & *pro hac vice.*

5. But as to merchants, as well natives as foreigners in amity, it seem this power at last of public inhibition was restrained by the statute of *Magna Carta, cap. 30. Omnes mercatores, nisi publicè antea prohibiti fuerint, habeant saluum securum conductum exire de Angliâ et venire in Angliam, ita per terram quàm per aquam, ad emendum vel vendendum, à aliquibus malis tolnetis, &c.* wherein Sir Edward Coke takes observation, that public prohibitions, in reference to merchants, is not intended of prohibition by proclamation but by act of parliament. And this statute of *Magna Carta* is much enforced by the statutes of 2. E. 3. c. 9. 14. E. 3. c. 2. that all merchants-privies or strangers may go and come with their merchandises into England after the tenor of the great charter, and divers other statutes to the same purpose.

By the statute of 5. R. 2. cap. 2. all men were inhibited to go beyond sea without licence under pain of forfeiture of all their goods, except the lords and great men of the realm and true and notable merchants, and the king's soldiers.

And this statute continued long in force; and yet we find it doubted in *Dy. ubi supra*, whether without an express inhibition it were a contempt to pass the seas without licence.

But by the statute of 4. Ja. cap. 1. this clause of the statute of 5. R. 2. is repealed; so that at this day the law stands in all points as it did before the statute of 5. R. 2.

There belongs to this part of the *jus regium* another kind of inhibition, viz. the inhibition of the exportation of the things, in which the strength and safety of the kingdom were concerned; as the inhibition of the exporting of hories, arms, bows, arrows, and the like offensive and defensive weapons and provisions of war. But these will more properly come under the second general, viz. the king's prerogative in part of the sea in relation to commerce and trade; which will be the subject of the next chapter.

C A P. IX.

concerning the *jus regium* in ports of the sea in relation to commerce and trade.

COME to the second branch of the king's right in ports, viz. in relation to commerce; and I shall hold the same method therein as in the former.

That, wherein the exercise of this right is observable, is the power of opening or shutting of the ports in reference to goods imported or imported; and therein I shall consider,

What *de facto* hath been done in this kind.

What *de jure* may be done therein.

As touching both the former and latter, for the more methodical proceeding therein there may be these two considerations:

1.) The prerogative or power of the king in opening of ports, where the law hath, as I may say, shut them; viz. when there is a prohibition by act of parliament of the importation or exportation of goods under pain of forfeiture. *Vide* Rep. 88. Cas. Monopolies. In that case, the king hath a peculiar power by a *non obstante* though not *in toto*, to abrogate yet in particular cases of particular quantities, or particular persons, and for a determinate time, to dispense with this law, to open the ports, notwithstanding this prohibition, but to grant a general dispensation. *Vide tamen* stat. 26. H. 8.

10. power given to the king to dispense with statutes of this nature. But because this consideration rather respects the prerogative of the king in dispensing with penal laws, and doth so directly concern the business of the ports, I pass this.

2.) The prerogative of the king in closing or shutting of ports, and that under a double respect:

1. The closing of the ports against the importation of goods or merchandize.

2. The closing or shutting of the ports against the exportation of goods.

And I shall examine both these in their order.

And first, concerning importation of foreign goods, the prohibition of the importation of them. We may *de facto* that such inhibitions have been of two sorts, general inhibitions that such or such merchandizes shall

merchandizes shall not at all be imported, under pain of confiscation or forfeiture; or else they have been inhibitions or restraints *sub modo*; as, namely, they shall be imported only at such ports or in such ships.

First, For general prohibitions of merchandizes of a particular kind. These were sometimes made, but very rarely: neither indeed could they be lawful without the help of an act of parliament, because there have been in times several statutes made for the liberty and encouragement of merchants strangers especially to come into the kingdom and trade, which could not be derogated by a proclamation. *Magna Carta*, cap. 30 2. E. 3. c. 4. 9. E. 3. c. 14. E. 3. c. 2. 25. E. 3. c. 2. and divers other statutes.

And therefore, if at any time there were such inhibitions by proclamation, they were commonly temporary upon the exigence of state, and not perpetual, nor of any certain continuance. But when there were perpetual or long continuances of this nature, they were always done by parliament. 3. E. 4. c. 4. 1. R. 3. c. 12. 19. H. 7. c. 2. against importation of foreign manufactures therein specified; 4. E. 4. c. 1. against importing of foreign cloaths; 5. Eliz. c. 7. against importation of daggers, &c.; H. 6. c. 1. an inhibition of the wares of Brabant and Holland, because they there had made restraint of importation of English cloth; 23. H. 8. c. 7. an inhibition by act of parliament of the importation of French wines between Michaelmas and Candlemas; and very many more of the like kind. And the reasons of these interposing acts of parliament was, because that proclamations proved very ineffectual to that purpose, partly because it was at that time doubtful whether they could at all be effectual against such private acts of parliament; but doubtless they could not without an act of parliament induce a forfeiture of the goods so imported, as hath been often resolved; whereof more hereafter. See the resolution of the case of monopolies, 11 R. 2. 88. the grant of the sole importation of foreign cloaths though prohibited by act of parliament, ruled to be against the law, and a monopoly. Much more were the things prohibited by law to be imported. *Vide* Peeth's case *Rot. Parl.* 50. E. 3.

The only act of parliament, that seems to give a countenance to these kinds of inhibitions, is that of 3. Ja. 1. The king granted a charter to the merchants, that Spanish wines should be imported but by them. This act repealed that charter in a great measure, where some would infer that the patent was good, but nothing but an act of parliament seemed necessary to repeal it. But the consequence is mistaken. In

an act of parliament was used in this case as the most safe and effectual means : but if any man consider those acts of parliament, that enact the sea to be open, or the resolutions of court in cases of this nature, or the very preamble of the act itself, he will easily find that such inhibitions cannot be without an act of parliament.

Secondly, as touching particular restraints ; as, for instance, that malmseys shall not be imported, but unto the port of Southampton ; such a grant is against law, and was accordingly resolved in the case of Southampton, *T. 1. Eliz. Rot. 73.* cited in Cooke's comment upon *Magna Carta*, c. 30. and therefore there was a special act of parliament made the 5. Eliz. for the making good of that charter ; and the like course hath been used to make good those restrictions of foreign trade to particular companies ; as, for instance, the Muscovy company, and any certain others.

And thus much briefly touching the point of the prerogative in reference to imported goods, and how it stands limited by law.

Concerning exportation, and how far forth the ports may be in reference to goods and merchandizes exported, both the *facti* and the *quid juris* therein. These prohibitions of exportation were never generally of all goods ; for that were to debar trade, but of some particular goods and merchandizes. And these restraints were of two kinds, viz. general restraints, that should not be at all exported ; or special and qualified restraints, that they should not be exported, but in such ships, or at such places. Touching both these briefly : and first, touching general inhibitions.

It is certain, that inhibitions of this nature were very frequent ; and when they carried with them the apparent reasonableness and fitness of the inhibition, they were not much objected. Those inhibitions were for the most part touching such commodities whereby the kingdom might be weakened, or scarce occasioned, by the exportation : as arms, ammunition, corn, silks, gold, silver, horses, timber, thread of yarn or woollen, sometimes of falcons. *Vide Claus. 10. E. 2. m. 13. dorso. 38. E. 3. m. 29. Claus. 41. E. 3. m. 24. dorso Claus. 43. E. 3. dorso. Cl. 45. E. 3. m. 4. dorso.* And sometimes in the proclamation there was annexed a clause of imprisonment of offenders ; sometimes the forfeiture of the things imported ; sometimes the forfeiture of all their goods and lands. But these sorts of forfeiture were only *in terrorem* ; for, as we have observed, a proclamation barely cannot induce a forfeiture of goods. But yet sometimes the searchers and officers did seize the goods ; and when they had so done, they were compelled to accompt for the goods so seized.

seized in the exchequer; and the parties, whose goods were seized, were put to much trouble, before they could have their goods again. But the most usual way to punish offenders against such proclamations was by fine and imprisonment; for what the king may by law prohibit, the proclamation doth increase the offence. And these proceedings were by information in the king's suit, sometimes in the king's bench, as *H. 1. E. 3. B. R. rot. 38.* against such as exported horses, arms, money, and plate, against the king's proclamation; sometimes in the exchequer, *Communia Trin. 16. E. 3. rot. mich. 19. E. 3. rot. claus. 64. m. 29.* and sometimes *coram concilio*, viz. chancery.

How far these proclamations might be warrantable by law in these particular cases, I shall not positively determine; only so far I shall say,

First, that if it were admitted, that in these particular cases of arms, ammunition, victuals, and money, such proclamations might be made, and thereby the offenders might be subject to fine and imprisonment; yet it could not be intended to other things, neither ought or might this inhibition be an engine to gain money for licences. For if a proclamation had any strength, it was because of the inconveniences of the exportation of these things. If it were a public inconveniency, it could not be inhibited barely by proclamation; and if it were a public inconveniency, it could not be licensed for private profit. If it might, the strength of the proclamation would consequently cease.

Secondly, if these proclamations were admitted lawful, yet they could not induce any forfeiture of lands or goods, or of the very goods so exported against that inhibition; because that lyes not within the strength of any thing but a law.

Thirdly, though possibly in the time of hostility, or public danger, or common scarcity, such prohibitions by proclamation of exportation of victuals and arms, might have a temporary effect and use; yet we may easily guess that they were not effectual for perpetuity, nor indeed sufficient provisions *pro tempore*; for the king and his council thought not fit to rest upon such ineffectual means, but acts of parliament have successively passed for the inhibition of exportation of these very things, with penalties of forfeitures added to them. See *1. E. 4. c. 5.* for horses; *1. E. 2. M. c. 5.* of corn, herring, butter, cheese, and wood; *H. 8. cap. 2.* of victuals of all sorts; *9. E. 3. cap. 19.* *H. 7. cap. 15.* of bullion or money. The like might be instanced in divers other things.

Let us now come to particulars, or qualified restraints, they are of two kinds:

First, The restraints of exportation in any but English bottoms. This hath been attempted to be done by proclamation, as a good expedient for the increase of shipping and mariners, and the encouragement of trade and navigation. *vide inde Claus. 41. E. 3. m. 25.* of a proclamation to that purpose; but it proved ineffectual, till provision was made for it by acts of parliament, viz. 5. R. 2. c. 3.—6. 2. c. 8.—14. R. 2. c. 6.—4. H. 7. c. 10. But because it provoked foreign princes to do the like, it was repealed by the statute 1. Eliz. c. 13, with certain provisions made in the case by that statute and the statutes of 5. Eliz. c. 5. and 3. Eliz. c. 15. But now, by a late act of parliament, 12. Car. 2. intitled, “An act for encouraging of navigation,” the use of foreign ships is in a great measure restrained.

Secondly, The restraint of exportation in any but from certain special ports, viz. the staples; whereof, and of their progress and cessation, in the next chapter, because it relates in a special manner to the business of the customs.

And thus I have passed through the consideration of the king's prerogative in ports, for their opening and shutting in relation to trade and commerce. And upon the whole matter, it will appear from the several acts of parliament that have been made for the support and increase of trade, and for the keeping the sea open to foreign and English merchants and merchandizes, that there is now no other means for the restraint of exportation or importation of goods and merchandizes in times of peace, but only when and where an act of parliament puts any restraint. Several acts of parliament having provided, *que la loi soit overt*, it may not be regularly shut against the merchandise of English, or foreigners in amity with this crown, by an act of parliament shut it, as it hath been done in some particular cases, and may be done in others.

C A P. X.

Concerning the jus regium in the ports, with relation to the customs.

WE come now to the third relation of this *jus regium* in the ports of the sea, viz. the relation to the customs, the exercise of the prerogative in the ports, under that relation. And this will be examined in these considerations.

Pl. I.

H

I. How

I. How far forth the king did *de facto*, and might *de jure*, mit the ports of exportation of customable goods, wherein customs might be answered.

II. How far he did and might settle in all ports such merchandise or conduccibles, as might be for the due answering of his customs. And herein,

(1.) Of the officers of the custom-house, and their

(2.) Of the means to discover the certain weight of merchandise; and therein of tronage.

(3.) The means to discover whether the customs were answered; and therein touching the cockets and certificates.

I. As to the first of these, viz. the limiting of ports wherein customable goods should be laden and unladen, I will consider these two things, viz.

(1.) How it stood as to this matter anciently.

(2.) How it stands at this day.

(1.) As to the former of these considerations, it is plain, from the beginning of Edward the first, until the time of Edward the third, there were few or no customs, but the custom of wools, woolfells, and leather, and the petty customs answered by merchants-strangers, expressed in the contract *Carta Mercatoria* of 31. E. 1. But the great and considerable revenue was that of the great customs.

For the better and more regular answering of these customs was thought fit, that there should be certain towns and places assigned for the venting of these merchandizes of wools, woolfells, and leather, where the king might have his custom-house officers settled, for the receipt of the customs. And the king had a great advantage in his hands to bring this to pass; cause the exporter, if he had not a cocket testifying the payment of his customs, the wools and leather so exported were liable to be forfeited, and seized as forfeit: so that there was no transporting of these commodities, but in such ports where a cocket, and the king's seal, with which it was to be sealed, was lodged.

But on the other side, as it concerned the king to secure his customs, so it concerned him, that the trade might not be obstructed; for that must of necessity impair his revenue of the customs; and therefore there was no great fear, that the trade would be confined to fewer ports, than stood with the absolute necessity of the securing of the customs.

The limiting of the ports wherein the king's customs were to be answered, were of two kinds, viz.

1. The *special* limitation of ports in relation to particular merchandizes.

2. The *general* limitation of ports of importation and exportation, in reference to all customable goods.

Touching the former of these, it is regularly true, that the might not, without an act of parliament, restrain the importation or exportation of goods to particular ports; and the reason is, because regularly all publick ports are free and *juris publici*. And therefore, when there was a grant to the bailiff and burghesses of Southampton, by queen Mary, that no malmsey should be imported at any port but Southampton, under penalty of payment of treble custom; it was resolved, first, that this restraint was against law; secondly, that the assessment of the custom was also against law. Cooke on *Magna Carta*, 30. pag. 61. Yet it is certain, that *de facto* in order to the better answering of the king's customs, there were certain ports of exportation limited for the merchandizes of the staple, which were called staples or ports of the staple, which were used before they were settled by the parliament, but with great uncertainty until they were settled by the parliament, viz. 27. E. 3. the merchandizes of the staples were wool, woolfells, leather, lead, and tin, as appears by the statutes of 27. E. 3. c. 21. R. 2. c. 17. and divers others. The first institution of the staples, viz. settled places for the market and ports for the exportation of these staple commodities, began thus: 1. *Parl. 6. E. 2. p. 2. m. 5.* the king issued a commission to divers merchants, to appoint certain staple ports, and to make ordinances for those staples, with certain penalties imposed upon those who did not submit to it. 2. *1. E. 2. m. 1. dorso*, strict commissions issued to inquire of offenders against the constitutions of the staple, which was made, as appears, in pursuance of the former commission. 3. *2. E. 3. m. 24.* there issued a proclamation bearing date May, 1. E. 3. wherein the ordinances of the staple made in the time of king Edward 2. are reinforced; the several ports in England, Ireland, and Wales, for the exportation of staple commodities are appointed; and several provisions against offenders. 4. *Pat. 6. E. 3. m. 2.* notwithstanding this statute, and although divers other statutes, and especially 9. E. 3. c. 2. and the 25. E. 3. c. 1. enacted a free market, especially to merchants and strangers; the usefulness and conveniency of staples appearing, they were again resettled by proclamation, as well on this side, as beyond

beyond the sea; as appears *Rot. Parl.* 17. E. 3. n. 58.—*E. 3. n. 10.—22. E. 3. n. 13.* But a proclamation was feeble a bottom for a business of this importance to commerce and the king's customs; and therefore an act of parliament was made for the settling of the staples, both for the market and exportation of staple commodities, viz. 27. E. 3. c. 1. *et sequentibus*; and then it was fixed, and so continued for a long time under those various alterations that were introduced there by several subsequent laws, till at length these staples became disused and antiquated.

Besides these staples, I find sometimes special restrictions of the passage of customable merchandizes at particular ports especially as to woollens and leather, out of which the great customs arose; and this the king had a great opportunity to do, by fixing the seal called the cocket, without which the goods were not suffered to pass unto some particular port. See accordingly *Claus.* 5. E. 3. p. 1. m. 12. *dorso*. The king having placed his cocket in particular ports therein mentioned issued a proclamation, that no woolls should be transported at those ports *ubi sigillum nostrum quod dicitur cockquet et sigillum nostrum deputantur*, viz. Newcastle, Kingston-upon-Hull, Botolph's, Lyme, Yarmouth, Ipswich, London, Southampton, Chichester, Melcomb, Exeter, Hartlepoole, Sandwich, which was in effect nothing else but a staple, but not so called because of the late statute of the 2. E. 3. that took away.

But this was against the great charter, of which the first of 18. E. 3. c. 3. *que le mere soit overt* is but declarative; therefore the erection of those exclusive ports by the statute of 27. E. 3. c. 1. of the staple was requisite. Otherwise it might not have been legally done; for as well as some ports might be inhibited, more might be inhibited, which might much impair the trade of the kingdom. See the petition in parliament 6. H. 4. n. 54. against the restraint of the shipping of woolls from Ipswich, to their great disease and destruction, and the damage of the loss of their woolls, and the diminution of the king's customs.

Thus much shall serve touching the particular limitations of ports, in reference to particular merchandizes.

2. The general limitation of the ports for the importation and exportation, was made first by the statute of 4. H. 4. c. 1. of great ports, and after by the act of parliament of 1. Eliz. 11. And indeed without an act of parliament such a limitation could not be, for it is against the liberty and *jus publicum* of ports.

By the latter statute it was enacted, that no ship be laden or unladen, but in some open place assigned by the queen's commission to the ports of London, Southampton, Bristol, Chester, and Newcastle, and in some open key or wharf in all other ports, rivers, creeks or roads, Hull only excepted, where a customhouse comptroller and searcher had been for ten years last resident, or should be resident.

And thus much shall serve touching the *jus regium* in ports, to open shut or limit them in relation to the customs.

C A P. XI.

Touching the officers of the customs attending the customs; the *tronage*, or king's beam; and the *cocket*, or certificate of customs paid.

BEFORE I can leave the business of the king's ports, and the relations they have to the customs, I must give some observations touching these three matters, viz.

I. The officers of the king's customs.

II. The *tronum*, or *tronage*.

III. The *cocket* and certificate testifying the payment of the customs.

In every great port in England or Wales, there have been, and still are, three great officers, viz. the collector, comptroller, and searcher; besides other petty subordinate officers, land-waiters and tides-men. But in the port of London, besides these officers, there is a new-erected officer, viz. the surveyor of the customs.

Touching *tronage*, *pesage*, &c. the king being anciently answered some customs that were with relation to weight, viz. sacks of wool that answered by weight, and some customs of merchants-strangers which were answered by weight, there were two kinds of officers, which yet were commonly united in one person in every port, viz. *tronagium*, which was the scale and weights for wool; and *pesagium*, which was in reference to *averpise*.

Touching the *tronagium lanarum*, it was oftentimes in farm, sometimes granted to the ports wherein it was exercised, sometimes exercised by a particular officer appointed thereunto; but when it was not under grant or farm, commonly the government was under the collector of the great customs in every port; together with the account of his collection of the great customs,

toms, he gave an account also of the profits of the tronage; appears in the accompts of the customs, in the times of king Edward the first, Edward the second, Edward the third, in the place which I have perused.

It appears by those accompts, that this office, as well as that of the customer, comptroller, and searcher, was in the king's disposal. That which was answered to the crown for tronage, differs in several parts; but ordinarily it did not exceed 2 d. for every sack of wool, or for every merchant that weighed wool; and in some ports it was answered by the sack; as at Chester, *de quolibet sacco lanæ unum quadrantem*.

The entry of the collector's account in relation to tronage commonly run thus:

Et respondet de 5l. provenientibus de tronagio prædictarum portuum, viz. de quolibet sacco integro 2 d. ob. Thus it was answered in the ports of London, Lyme, Boston, &c. but at Chester, *de quolibet sacco unum quadrantem*.

And thus much briefly of tronage.

III. Touching cocquets and certificates, these are testimonies from the officers above stairs, viz. the customer and comptroller, that the king's duties were paid; without which the searcher whose office it was to clear the ship, would not give liberty for the ship to pass; for the want of these was in effect a forfeiture, for the times of the ship itself, but commonly of the customable goods that were laid on board without this certificate. This, though it might properly seem to belong to the Third Part of this tract, which concerns the customs themselves; yet, because it imposeth a kind of restraint upon the liberty of the port with relation to the customs, it may come in proper enough here, and be preparatory to the consideration of the business of the customs.

First, touching the cocquet. This was nothing else but a testimonial, that the customs outwards due to the king are paid.

The cocquet began with the great customs of wools, woolfells, and leather; for there were no other goods that paid customs outwards anciently but these; neither was there any other goods cocquetted but these; insomuch that these great customs in many records are called the cocquet, or custom of the cocquet: for there were no other goods necessary to be cocquetted. And therefore it was a great mistake in the beginning of the late king's time, when there was no subsidy of tonnage and poundage set upon them, to think, that the not cocquetting of any goods, other than wools, woolfells, and leather, should be a forfeiture of them, or a ground in law to stay them from passage outward; for most clearly the cocquet was only necessary where there were customs due by

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But when other goods were charged by act of parliament with duties outwards, then indeed the cocquet was requisite as well for other goods as for wools, woolfells, and leather.

Touching the cocquet as it stood anciently, when the customs of wools, woolfells, and leather, were in use, we will consider,

(1.) The form of it.

(2.) The seal,

(3.) The fee.

(1st.) The form of it anciently ran in Latin in the king's name, viz.

Edwardus omnibus, ad quos, salutem. Sciatis, quod J. S. nobis solvit in portu nostro London. custumas nobis debitas pro tribus saccis lanæ, quo quietus est, testibus collectore & contrarolatore custumarum nostrarum in portu prædicto die anno, &c. And these words in the conclusion, *quo quietus, &c.* gave it the name of the cocquet.

This was subscribed by the collector and comptroller of the port, sealed with the cocquet seal, and delivered to the master of the ship or the merchant, and was the warrant to the searcher to clear off the ship.

And the form of the cocquet at this day for that leather that is transportable by law, continues still in the king's name, though in English. But for other merchandises outward it is altered, as shall be shewn in its place.

(2.) The seal.—The king usually in these ancient times sent out of the exchequer a particular seal of his own for the sealing of these cocquets, which was called *sigillum de cocketto*, and commonly in those elder times rested in the hands of the comptroller of the customs.

(3.) Upon the cocquet of wools, woolfells, and leather, there was anciently answered to the crown a certain duty, for which the collector for the customs answered upon his account under the name of *exitus de cocketto*. Vide stat. 4. H. 4. c. 21. ; 14. H. 6. c. 1. ; and sometimes *exitus sigilli, quod vocatur cocquett* ; which was most commonly 2d. of every merchant transporting wools, woolfells, or leather, as appears in the customer's accounts in the 1st. ed. 1. 2. et 3. and commonly immediately succeeded his account of the customs, viz.

Et respondet de 5l. de exitibus de cocketto dictarum lanarum, viz. 2d. de quolibet mercatore lanas pellas lamitas vel coria habente, exeuntia de portu prædicto in aliquâ nave. But in some reports it was 2d. ob.

But divers statutes having inhibited the exportation of wools, woolfells, and leather, it seems this duty hath been antiquated ever since the time of E. 3. Only, as before, for such leather as is transportable

transportable by licence or act of parliament, the old cocquet continues. And thus much for the old cocquet.

At this day, and for many years, all or most part of goods outward as well as inward are charged with subsidy of tonnage and poundage; and therefore all goods exported must have a cocquet to testify the payment or security for the duties chargeable upon them, or otherwise they are seizable.

But these cocquets are not now made in the king's name, but under the king's seal, but are sealed with the officer's seal, and subscribed by the collector and comptroller, and one of the commissioners for the customs, or their deputy if in commission; by the collector and comptroller, or some of the farmers, or their deputy if in farm.

The cocquets at this day are of three kinds, viz. ordinary cocquets, parcel-cocquets, or coast-cocquets.

The common or ordinary cocquets run thus:

London. "Know ye, that *J. S.* 15 April 1664, being laden aboard the *Mayflower*, *J. S.* master, twenty Spanish cloths for Flushing, for all which the king's duties are fully paid. Witness our hands and the seal of our office, this 16 April 1664."

Subscribed by the officers of the custom-house, and some of the farmers or commissioners.

A parcel-cocquet is granted, where goods entered outward are not all shipped upon the same ship, but the searcher indorseth what part of them were; and then the cocquet is brought back, and kept by the officers that granted it, and a new cocquet made for so much only as was shipped upon the first ship, and a third cocquet is granted for the remaining part, as such merchant shall please, and the first cocquet is marked (1), the second (2), the third (3).

A coast-cocquet is granted, where native commodities are taken from one port to another within the realm; because in such case no custom or subsidy is due. Yet because when they are laden aboard, they may be transported to foreign parts, there is bond given for the unlading at the other port of discharge within the kingdom, and then a cocquet granted; and upon return of certificate that the goods are unladen in that other port, the bond is delivered up. Though ordinarily, if they are small parcels, such as commonly not intendible to be sent beyond sea, they pass by a warrant, which is called a *transire*; viz.

"Suffer *J. S.* to pass a hundred pound weight of groceries to Colchester in the *Bonadventure* of London, *J. S.* master. Dated at the Custom-house, 21 Nov. 1694."

Subscribed by the collector, comptroller, and one of the commissioners. Sealed.

Thus much concerning the cocquet, which is properly in
reference to goods customable outwards.

A word concerning certificates, which properly concern
foreign goods, or goods imported that pay customs inwards.
These certificates are of two kinds :

1. Certificates for the advantage of the merchant. By
the rules formerly set and at this day in force, merchants,
having paid their customs inwards, if they export the same
into foreign ports, have an allowance of part of their cus-
toms and subsidy. *Vide* the 2d and 4th rule of the book of
rates. And in such cases they ought to have certificates of
their payments inwards, to the end they may have their re-
payment according to the proportion of their customs.

2. Certificates for the advantage of the king, that he may
not be deceived. If foreign goods customable are imported
into one port and pay there their customs, if they are af-
terwards transported to another port within the kingdom,
they ought not to be chargeable a second time with their
customs upon importation into the second port; and to the
end the king may not be deceived in both places, by the
statute of 3. H. 7. c. 7. if goods be discharged or put to
sale in any other port than where they are first entered,
without a certificate of the nature of the goods and that the
customs are paid, the goods are forfeit.

Upon this statute it hath been used in the out-ports, that if
foreign goods are imported and after sent away by water in
barges or lighters to any port within the realm, in whole cask
or the same package by which they were imported, the offi-
cers of the custom-house refuse to let them pass, but by certi-
fying the payment of the customs; and therefore
required satisfaction, by oath or otherwise, that the
customs were paid: but if in broken or small parcels, they
are refused to pass them by *transire*, without such attestation or
certificate. But in the port of London they repass all goods
landed unto any port in England by *transire*, or let-pass,
without any taking notice whether the customs are paid or
not, which seems to be just and warrantable as to foreign
goods; because, if once landed and custom paid, no new
custom is due, whether exported beyond sea or to any port

A N A P P E N D I X.

C A P. XII.

Concerning the five ports; their names, privileges, and charges.

BECAUSE the cinque ports are or at least have been noted and famous ports of this kingdom, endued with great immunities, it shall not be amiss to add something way of appendix to the former discourse concerning them which at least in point of history may be of some use. herein I shall consider,

- I. The places or ports themselves, and their members.
- II. Their burthens, and charges or services.
- III. Their privileges and liberties.

I. Touching the first general head, the cinque ports and their members are set forth in several records and monuments. That, which I shall follow principally, is that old book of Sandwich before mentioned, wherein besides the particular matters relating to that port, are contained most of the principal matters relating in general to the cinque ports. first, viz. Hastings, lyes in Suffex, the rest in Kent. are these:

1. Hastings, *ad quem pertinent 10 membra, viz. unus qui dicitur littus maris in festedia* *, Pevennesfel, Burwarth Hydeny, Winchelsea, Rya, Yabanne, Bekeborne, et Grenthe but according to a later account, *Pevensey, Seaford, Blyth, Hythe, Petit-Iham, Hindin, Bekisborn, Grengre.*

2. Ramenhale, *ad quem pertinent Prouchelle, Lyde, Othston, Dengemareis, Vetus Romenale*; according to a later account, *Brombil, Ledd, Old Rumney, Dengimarsh, Overly.*

3. Hetha, *ad quem pertinet Westbethe.*

4. Dover, *ad quem pertinent Folkeston, Feversham, Marston de solo sed de cattallis et de novo concessio, Kingsdown de solo sed de cattallis*; according to a later account are

* This word is in the manuscript, but its import I know not. In Lamb. Kent and Jenkes's Cinque Ports the first member of Hastings is described *littus maris in SEAFORD*, instead of *festedia*. Perhaps, therefore, the last is a mistake of the transcriber. — EDITOR.

† One of the ten members professed to be enumerated is omitted. This is supplied by adding *Northie*, which is one of the ten mentioned by Mr. Lamb. See Lamb. Peramb. of Kent, ed. 1596. p. 121. — EDITOR.

St. John's, Gorend, Burchington, Woodchurch, St. Peter's, and Ringward.

X. 5. Sandwich, *ad quem pertinent Fordewicus Recolvea, quod undam fuit Serre, Stonoredale non de solo sed de cattallis et novo concessa, Walmere, Ramsgate; isti sunt non de solo sed de cattallis*; and according to the later account, *Foreditch, Deale, Walme, Ramsgate, Stoner, Serre, Brightlington.*

As to their services, they were of two kinds, viz. their honorary services, and their services in defence of the realm. The first touching either.

1.) Their honorary services were of two kinds; 1. At the coronation of the king or queen, or both; 2. At the parliament.

1. At the coronation the solemnity of their service was thus. *First*, the summons and service for the coronation was and ought to be forty days before it be performed; and one of these writs ought to be directed to the warden of the cinque ports. *Secondly*, the writ being received, the barons of the cinque ports meet at Brodhul; and there, if the king and queen be both crowned together, they chuse 32 barons, one alone then 16 barons, to perform the service for the cinque ports, who were to habit or clothe themselves at their own charge, but their stay at court was to be at the common charge of the five ports. *Thirdly*, at the day of coronation there was to be a purple canopy carried over the king, and another over the queen if she were to be crowned also, each canopy to be born up with four silver staves, and upon the top of every staff a silver bell, and each staff was to be carried by four of the barons of the five ports, viz. 16 to every canopy. *Fourthly*, after the coronation made, when the king dines in the great hall, the barons of the five ports were to have a table to themselves on the right hand of the king for themselves and the rest of the barons of the five ports that will be present. *Fifthly*, all being performed, the canopy staves and bells are the fees belonging to the barons of the five ports; and if there be two such canopies, the barons of the port of Hastings are to have one, which they give to the Church of Chichester; and the rest of the barons the other, which they give to the church of St. Thomas of Canterbury; and divide the bells and staves among themselves.

2. Their second sort of honorary service is in parliament. Upon summons directed to the warden of the five ports, each of the ports send two barons to the parliament, which are there by the name of *barones quinque portuum*.

(2.) I come to their naval services in defence of the sea and coast, which the barons of the several ports are bound to provide at the summons of their service by writ under great seal, which ought to issue forty days before the service and rendezvous appointed.

1. The port of Hastings with its members are to find 5 ships, and in every ship 21 men.

2. The port of Ramenale with its members are to find 5 ships, in every ship 21 men.

3. The port of Hethe with its members are to find 5 ships, in each ship 21 men.

4. The port of Dover with its members are to find 5 ships, in each ship 21 men.

5. The port of Sandwich *cum membris* are to find 5 ships and in each ship 21 men.

In the whole 57 ships.

Thus their service is recorded in that old book of Sandwich, and in the red book of the exchequer fol. 196.

Upon the summons, these ships ought to continue in the king's service at the respective charge of the ports by the charter of fifteen days, the first day being reckoned the day when they set sail to the general rendezvous.

But if the king need their service longer, they are to be in the king's charge, which is particularly inserted in the charter book, viz. 6d. *per diem* to the master, 6d. *per diem* to the captain *constabulario*, and 3d. *per diem* to every other.

The distribution of the gross charge of the ports upon the members was ascertained by custom.

The means of bearing the charge was by contribution from the several inhabitants of the ports *secundum facultates*; this was so settled by the charter of 26. Ed. 1. viz. *quod omnes illi de quinque portibus prædictis, et alii quicunque advocati se de libertate eorundem et eâ gaudere volentes, contribuant, quilibet eorum juxta facultates.* This charter was confirmed by Rot. Pat. 1. E. 3. p. 1. m. 24. And further it was granted by assent of parliament, *quod omnes illi de quinque portibus alii quicunque advocantes se de libertate eorundem et inde gaudere volentes, contribuant ad navigium et servicium prædictum secundum dum et manutenendum, de omnibus bonis et cattallis suis tamque libertatem quinque portuum quam infra: et ad hoc per majores juratos quinque portuum prædictorum, et etiam per constabulum nostrum Dover, si necesse fuerit, debite compellantur*; and also as well their foreign goods as their goods within the ports should contribute to the tallages set upon these ports; and

another charge that lay upon these ports, viz. tallage; which was in use before the stat. of 25. E. 1. *de tallagio non edendo*, viz. the king was used to tallage his own ancient demesnes, and among these the five ports, or at least all of them, Sandwich, which, as hath been formerly shewn, was not of the king's ancient demesnes, but came to him by exchange with the archbishop of Canterbury.

And thus much concerning the charges of the cinque ports. Therefore,

II. In the next place, concerning their immunities and privileges.—Some they had by prescription or custom; others had by charter; though for the most part their customary privileges were recited and confirmed, and others granted by charter. I shall therefore in the first place mention their principal charters, and then make some observations upon them relating to their liberties and privileges.

Their charters were many and ancient; but the principal and most comprehensive were two charters granted by Ed. 1. which are exemplified and confirmed 1^{ma}. *Par. Pat.* 5. m. 27.

The former, granted 17 Jan. 6. E. 1. whereby their ancient liberties are confirmed, and farther liberties granted, viz.

quod quieti sint de omni theolonio et omni consuetudine, viz. lastallagio, passagio, cariagio, rivagio, sponsagio, et omni wrecco, totâ venditione achato et rechato, per totam terram et potestatem eam, cum socâ et saccâ thol et them: et quod habeant insangthes; quod sint wrecfry, witefry, et lastagefry; et quod habeant in et strand apud Yernemuth, secundum quod continetur in charta per nos inde factâ et perpetuò observandâ; et quod sint de shiris et hundris, ita quod si quis versus eos placitare vel ipsi non respondeant, neque placitent aliter quam placitare solent tempore Henrici proavi nostri; et quod habeant invenciones suas in mari et in terrâ; et quod quieti sint de omnibus suis et de toto mercato suo, sicut liberi homines; et quod habeant honores suos in curiâ nostrâ, et libertates suas per totam nostram quocunque venerint; et quod ipsi de omnibus terris quas tempore Hen. regis patris nostri, viz. anno regni sui 44^o. tenuerunt, quieti sint in perpetuum de communibus summonitionibus iusticiariis nostris ad quæcunque placita itinerantibus, in quicunque comitatibus terræ suæ existent, ita quod ipsi non teneantur coram iusticiariis prædictis, nisi aliquis baronum ipsorum implacitet vel ab aliquo implacitetur; et quod non implacitetur nisi ubi debuerunt et ubi solebant, scilicet apud Shipwey. With a confirmation of other ancient liberties, &c. Ita quod si ipsi barones in iustitiâ faciendâ seu recipiendâ defuerint, nos et hæredum nostrorum quinque portuum, qui pro tempore

tempore fuerit, portus et libertates eorundem ingrediatur ad nam justitiam faciendam; ita quòd dicti barones et hæredes facient nobis et hæredibus nostris regibus Angliæ per annum narium servicium suum 57 navium ad custum suum per 15 ad nostram vel hæredum nostrorum summonitionem. Concessimus etiam eisdem, quod habeant infangthes in terris suis infra prædictos eodem modo, quo archiepiscopi episcopi abbates comites et barones habeant in terris suis in Com. Kanc. et quòd non pœnant in assisis et juratis vel recognitionibus ratione forinsecæ tenure contra voluntatem suam; et quòd de propriis vinis suis de quo negotiantur, quieti sint de rectâ prisâ nostrâ, viz. de uno dolio ante malum, de alio post malum. Concessimus etiam, quòd nos, hæredes nostri, non habeamus custodias vel maritagia hæredum eorum, ratione terrarum, quas habent infra libertates et portus prædictos, de quibus facient servicium suum antedictum, et de quo nos vel antecessores nostri custodias et maritagia non habuimus temporibus retroactis. Prædictam autem confirmationem et concessionem fieri fecimus, salvâ semper in omnibus regiâ dignitate, salvis nobis et hæredibus nostris placitis coronæ nostræ vitæ et memororum.

The other charter was made by the same king E. 1. 28 April 26. E. 1. whereby he grants to the barons of the ports for their service,

Quòd ipsi, et eorum hæredes barones eorundem portuum, cætero sint quieti de omnibus tallagiis et auxiliis nobis et hæredibus nostris, de corporibus propriarum navium suarum et de attilio * præstandis; et quòd de legalibus rebus et mercimoniis quas ipsi intrâ terram nostram Hiberniæ debito modo emergerint, nullus rebus et mercimoniis illis sit eorum particeps, cum illis contrâ voluntatem suam inde particeps quoquo modo quòd omnes illi infra dictos 5 portus oriundi, licet ipsi vel tenementa extrâ libertatem eorundem portuum tenuerint tale servicium per quod maritagia eorum ratione minoris et ipsorum ad nos vel hæredes nostros pertinere deberent, se mutare possint sine occasione nostrâ hæredum vel successorum nostrorum, salvo jure alterius cujuscunque. And then follows charter of 28 April, 26. E. 1. touching the contribution of all ad navigium juxta facultates, whereof before.

These be the principal liberties of the five ports. It is to be noted, that they had other liberties, which they claim by prescription. Some have been allowed, some disallowed; as, namely, a liberty that they claimed in nature of reprisal or without, viz. that if any of their members were injured, or unjustly imprisoned in London, they claimed by custom to attach and imprison any freeman found within their ports, till right were done to them.

* Attilio is in the manuscript. But Mr. Jeake, after observing, that this is in Mr. Thynn's manuscript of this charter, substitutes articulo for it. Cinque Ports, 39.—EDITOR.

This upon solemn argument, 41, 42. El. C. B. was
 judged a void custom.

The charters mention some differences between the barons of
 five ports and those of Great Yarmouth, which was prin-
 cipally touching certain privileges claimed by them of the five
 in the faire and herring-fishing at Yarmouth. These dif-
 ferences received several decisions by the king and his council,
 long here to be inserted. One is mentioned in the charter
 E. 1. which was 20 May 5. E. 1. another the last of
 ch 33. E. 1. *Vide Pat. 6. E. 3. m. 19. Pat. 5. E. 3.*
m. 1.

Touching the jurisdiction of the five ports, it is to be
 known, that each of the ports had their own particular court
 matters respectively arising within the ports.

But besides that, they had a common court at Shipway,
 wherein there sat as judges the warden of the cinque ports and
 mayors and bailiffs of each of their several ports, at which
 there was a grand inquest returned, viz. two, three, or
 four out of each of the cinque ports. And here they met as
 a common body; judgments were given by the common
 consent of the warden, mayors, and bailiffs, but pronounced
 by the warden; and to this court belonged cognizance of trea-
 son against the king, and of false judgments given in any one
 of the cinque ports, and of subtraction of the service of the
 belonging to the ports. So that hereby and by the charter
 recited it should seem, erroneous judgments, given by
 particular ports, should be reversed before the warden of the
 ports as above. Yet our books tell us, it was to be re-
 versed before the constable of the castle of Dover, 30. H. 6. 6.
 He is not as constable of Dover castle, but as warden of the
 five ports; for both these offices are ordinarily in one
 person.

Touching their clause of exemption from being put in ju-
 ry by reason of their foreign tenures; there was a charter
 towards, 12 Feb. 18. E. 1. which was somewhat fuller
 than the former. But in parliament E. 1. there grew a
 question touching the interpretation of these charters; and it
 was resolved in parliament,

That for their foreign lands which they had purchased,
 should after purchase, they were to perform their services in
 as other freeholders.

For the foreign lands they had at the time of the charter
 granted, they were exempt from juries.

3. But

3. But for these foreign lands, if they left the ports resided upon their foreign tenures, and attended not the service in the ports, they were to serve in juries.

4. But it seems by the judgment, that even for their reign tenures which they purchas'd after, their personal attendance upon juries should be excused, so long as they were actually employed in service within the ports. *Rot. Parl. 50. E. 3. n. 172. Quere tamen de hoc.*

In the charter there are two special exceptions, viz. *dignitate regiâ, et salvo placitis coronæ*; touching which, some other things relating to the jurisdiction and exemption of the cinque ports, there are these things observable:

1. The liberty of the five ports doth not hold against the king's immediate interest; neither would it have so done though this *salvâ* had been omitted; for the king's grant is not presumed to exclude himself, without special words. *V. P. 9. E. 1. B. R. rot.*

2. That although an appeal lyes in the cinque ports for some felonies, yet, if the defendant be at large in the county of Kent or elsewhere, or in the custody of the marshall, appeal may be brought in the king's bench for a murder or other felony done in the five ports, and the writ shall be directed to the sheriff of Kent; and when issue is joined, and a surmise that the place is within the five ports, *ubi brevis mini regis non currit*, and that such a place is the next visne it shall be tried at that visne next adjacent; and the sheriff of Kent shall return the jury, and not the guardian of the five ports; for although the five ports be an exempt jurisdiction, yet they are part of the county. *V. M. 45. El. B. R. Yelvert. Rep. n. 8. et Crook, n. 22. Criff. Verrol, T. 43. El. Brayne's Case.*

3. In inditements for felony or other matters before the mayor and jurats of the five ports, a *certiorari* lyes to remove them into the king's bench; for those pleas are before the justices of peace: but otherwise it is of civil suits, which are in their courts; and the writ shall not be directed to the warden of the five ports, but to the mayor, &c. of that where the inditement depends. Only, if it be such a case wherein they have jurisdiction, the court may and do remove it; but if it be of such a felony as is not within their jurisdiction, viz. a felony made such after the grant of a franchise, as buggery, &c. there it shall not be removed. *P. 8. Car. B. Regis. Crook n. 3. & T. 8. Car. ibidem. Tindal's Case.*

7. If in a civil suit, in the courts at Westminster, be joined upon a matter alledged within the five ports

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ll be tried by the visne next adjoining, by a *venire facias* directed to the sheriff of Kent or Suffex, where the port is, H. 6. 26. But if a man hath a judgment in the king's court, against one that hath lands in the five ports, the record shall be removed into the chancery by *certiorari*, and thence by *mittimus* to the constable of Dover castle, to make execution. M. 3. et 4. P. & M. Bendl.

And it should seem, that although mention be often made of the constable of Dover castle, as the immediate party to whom the concerns of the five ports belong, it in truth concerns him so much as he is constable, but as he is guardian of the five ports, though commonly the same man be both.

That notwithstanding the exemption of the cinque ports, they are liable to make execution of the king's mandatory writs; especially in matters relating to the liberty of the subject, in matters of state. *Vide* mandate to deliver a party causelessly imprisoned there, *Claus. 21. E. 1. m. 5. Vide inter placita parenti 33. E. 1. libro parl.* where Michaelis de Seagrave was imprisoned by the warden of the five ports, by the king's precept, in the precincts of Dover, and after rescued by the barons of the court, upon pretence of an arrest contrary to their liberties; they were fined to find a ship four months for this con-

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P A R S T E R T I A.

Concerning the customs of goods imported and exported.

C A P. I.

The order and method of the whole ensuing discourse.

HAVING in the former Part, as preparatory to this, gone through the examination or history of the ports, I now proceed to the history or narrative of the king's customs, in which I shall proceed in the order ensuing.

The customs, that have belonged to the crown of England out of the revenue thereof, are of two kinds, viz. the inland customs, or the maritime customs.

The inland customs, as I may call them, are those prerogative-revenues, that arise within the land for the maintenance of the royal state; of which some are ancient and fixed in the law; as goods of felons, fugitives and outlawed persons, and strays, tolls of several sorts, &c.: some casual or occasional; as hideage, cranage, escuage, tallage of his demesnes, tenths of boroughs, fifteenths, subsidies, &c.

The maritime customs were of two kinds, viz. such as were ancient and hereditary, or such as were casual and temporary.

The fixed or hereditary seem to be of these kinds, viz.

1. Such as are settled in the crown by the common law, which is that of prisage.

2. Such as are settled in the crown by special custom. Such as those customs of ports, that by prescription or usage are due to the king, or other lords of ports by derivation from the king, expressly by charter, or implied by prescription.

3. Such as are settled in the crown originally by act of parliament; as the great customs of wools, woolfells, and skins.

Such as in their original were only by impositions, but by long usage have obtained the reputation of a right; as the custom of cloth.

5. Such, as are settled by composition or contract, those that were settled in the crown by *carta mercatorum* merchants aliens.

Of these I shall discourse under the several periods of times wherein they began and took place, and shall shew the original growth and interruption, according to the several series of the times relating to them.

The casual or temporary duties were such as had no certain or fixed continuance; and they were of two kinds, viz.

1. Such as were granted by parliament, sometimes for years, sometimes for life; sometimes in one proportion, sometimes in another; as the various subsidies of tonnage and poundage.

2. Such as had the inception by imposition by the grant of patent, either in the intermission of these subsidies or by way of accession to or augmentation of them upon wines principally, began by queen Mary, and afterwards continued by intermediate vicissitudes until this time.

These also I shall take up in order, and in series of times as they arrive, with the several laws occasionally made with relation to these duties, as they occur in order of time.

And because prisage of wines seems to be an ancient primitive duty taken by the crown in all times, I shall begin my course with that duty. Then I shall descend to those considerable duties arising by usage in several ports. And then I shall take up the consideration of those other customs, both permanent and temporary, according to the order and series of the several times, and the several kings reigns in which they began or were augmented, diminished, repealed, revived or altered. And when I have gone through these, I shall have finished what I intended in this particular, viz. *è profundo antiquitatis vestigialium maritimarum origines ac progressus in Angliam trahere ac luci reddere.*

C A P. II.

Concerning prisage of wines; its nature, original, and progress.

I see Davis Act 10. A. 13. 30. Davis
PRISAGE of wines is an ancient inheritance of the crown of England; and is no part of that prerogative which is called purveyance, to take provisions for the household; but it is a fixed settled inheritance, and possibly in its original it might take its rise from the

*x Import. 50. Hale's Mss. Ancestral
 notes 270*

and therefore it was agreed, 40. 41. Eliz. in a *quo warranto* against Haughton, who had the prisage of London and the ports adjacent, and the office of Butler there, for years by the king's grant, that it was grantable for years or otherwise. In Ireland, it hath been received to the use of the crown by the family of the Butlers, now earls of Ormond, being the king's chief butlers of Ireland by tenure.

It is called in old statutes and charters *recta prisā vinorum*, sometimes *certa prisā*, viz. two ton of wines in every ship laden with 20 tons, one before the mast, one behind, paying *pro quolibet dolio*. *Kid. cartam* 18. H. 3. *civibus Londoniensibus insuper eisdem civibus, per totam terram et potestatem maris, ubi veniunt cum aliquibus mercandisiis, ac etiam per omnes maris tam citra mare quā ultra, quod quieti sint de theolonia, et omni aliā consuetudine, exceptā antiquā prisā nostrā, viz. unius dolii ante malum et alterius retrā malum, viginti* *pro dolio solvendi*.

This twenty shillings per ton is at this day turned into the payment of freight, as I take it.

In this section I shall declare,

I. Of what prisage is due.

II. Of what quantity and by what proportion it is due.

III. In what manner to be taken.

IV. When it becomes due.

V. What remedy for it.

VI. Who are discharged, and by what words.

VII. Who may have it in point of perannuity, and by what title.

For the first of these, it seems it is due of all sorts of wines; although, *Rat. Parl.* 8. E. 2. m. 16. it seems there was a question made, whether this prerogative extended to Renish wines, or only to Gascoign wines. But it seems that it extended to all sorts of wines; and so it hath been ruled.

For the quantity of which it is to be taken, in the parliament roll 1. H. 4. n. 161. and 2. H. 4. n. 109. it is recited in petition of the commons, that this duty commenced by act in parliament (but it is not shewn when and where); that by that grant it was proved, that of every ship laden with 30 tons of wine, the king should have one ton before the mast, another behind the mast; and that it was so used until the 17. R. 2. when John Waltham, bishop of Salisbury, *torcement et sans authority de parlement fist le botteler en chescun port devert le South et West, de chescun 10 tuns et de 20 tuns 2 tuns, pur le prise, encounter les usages*; that judgment had been given in 16. 17. R. 2. in the exchequer

*See Dan.
10. Vol.
Regard.
Note 270.*

exchequer against some Western merchants accordingly; and they pray remedy. All the answer that could be obtained both these petitions was only, *soit use come ad este use devours heures.*

But certainly the constant practice and right hath been, the king to have two tons for prisage of every ship laden with twenty; and accordingly it is declared in the bill that passed both houses, 17. Car. 1. for tonnage and poundage.

And as to the taking of one ton of every ship laden with ten, it hath been the constant practice of the farmer of the prisage to take it accordingly; and very many decrees in the court of exchequer are in affirmation of it. And according to an old book manuscript, intituled, *Consuetudines et Usus in Portu Sandwici*, begun by Adam de Campney 29. E. 1. but continued to the latter end of E. 3. viz. fo. 3. *Item dominus rex habet prisam suam, et custodem prisæ suæ, qui capit prisam in hunc modum de quolibet nave carcatâ vinis, utrum fuerit parva vel magis dammodo gerat 20 dolia, et venerit vel de partibus Vasconie vel aliis portibus ubi vina crescuntur, et velit ire ultra mare vel locum aliquem in Angliâ ubi custos prisæ fortè non est constitutus, si debet discurrere in eadem villâ, unum dolium, quod eligere voluerit ante malum, et aliud dolium post malum, solvendo pro illis duobus doliis 40s. scilicet 20s. pro utroque. Solet tamen ipse custos de duobus doliis pro 40s. ut prædictum, vel unum dolium et nobile aliud non est recta prisæ. Si autem fuerint in dictâ nave 19 doliis vini, non capiatur de illis nisi unum dolium pro 20s. et si fuerint 10 dolia vini, capiatur unum dolium; si verò 9 dolia vini fuerint, nulla prisæ capiatur. Et ab istâ prisâ sunt omnes barones qui portuum liberi.*

And in an ancient manuscript book, that I have seen, touching the customs of London, written about the middle of E. 3. there is this memorandum touching prisage. *La prisage vines al oeps le roy. Si 9 tonneaux de vin venent, ou meins, en un bat, le chamberlein le roy riens prendra à la prise le droit; si 10 tonneaux de vin venent, il doit prendre un tonnel; si 19 tonneaux venent, il ne prendra forsque un tonnel; en 20 tonneaux le chamberlein prendra 2 tonnells; et si 100 tonneaux ensemble en un neif venent, le chamberlein le roy ne doit prendre forsque 2 tonneaux; et si un grant neif, que vient ove vines, doit discharger en batteaux avant que il veigne en havene, et la suite les batteaux ove les vines remanants deliver al batteaux le chamberlyn ne doit prendre ne de la neife ne des batteaux un sol prise; et si de les mariners de la neif ou de les batteaux la prise le roy eit estre prise à Sandwic ou à aucun autre port de la mere per le chamberlein ou per autre bayly à ceo autement le roy, ne doit le chamberlein riens prendre à Londres, mais tout le pover le roy doivent les merchants, à que les vines sont*

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per la première prise ; et quant 9 tonneaux ou 10 tonneaux ven-
 à London en bat. bien list al chamberlein de prendre le siance ou
 erement de merchants, à qui les vines sont, que eux ne sont ne se
 en tiel manner faire venter les vines per parcel pur toller ou pur
 uer le prise nostre seigneur le roy.

But if less than 10 tons be laden in any ship, the king is not to
 any prisage *pro rata*, but the merchant is to be discharged
 reof.

Yet if the lading of the ship with a smaller proportion than ten
 re apparently fraudulent to deceive the king of his prisage, there
 re been several decrees in the exchequer-chamber, for the re-
 of the king and his farmer against such fraudulent lading, and
 a proportionable allowance to the king or his farmer, though
 lading of the ship were under ten ton *.

For instance : a merchant at the port of A. in France hath
 ton of wine to send for England to the same port, viz. to the
 of Hull or any other port ; and there are several ships in the
 of A. bound for the port of Hull ; and the merchant may
 re stowage if he pleases for all his wines in one of these ships,
 he will lade them all in three several ships bound for the same
 rt, viz. eight in one ship, six in another, and six in another,
 bound for the same port : in this case, though in strictness of
 no prisage be due, yet the king shall have his full prisage made
 od to him, by decree in the exchequer-chamber ; for it is ap-
 ent fraud to deceive the king of his duty. And accordingly it
 decreed in the case of sir William Waller and a merchant of
 all †.

But if there be several proprietors of several wines under 10 ton
 ace, though in all amounting to 10 or 20 ton, and they lade
 in all in several ships under 10 ton in a ship to the same port ;
 if the same man be proprietor of several parcels of wine a-
 ounting to 20 ton, and for want of stowage in one ship lade
 in several ships in small parcels upon necessity, though all
 and to the same port ; here the wine shall not be charged by
 mputation with prisage. But then it is incumbent upon the
 merchant to make it appear, that he was constrained by necessity
 a division of them ; because otherwise, coming from the same
 rt to the same port, at the same vintage, or at or very near the
 ne time, it carries a presumption of fraud *primâ facie*. But if
 y be the wines of the same proprietor, and come from several
 rts, or to several ports, or from the same port to the same port

See acc. the Attorney-General v. Shirt, Hardr. 56. and the precedents there
 ; and also the Attorney-General v. Horsham, ibid 477.—EDITOR.
 This same case is reported in Hardr. 218.—EDITOR.

at several considerable distances of time, then no such fraud presumed; and therefore he shall not pay prisage for all his wines by way of computation of all the quantities together.

If a man lade aboard a ship about 9 ton and under 10 ton, by the help of the court of equity the king shall have one ton prisage, though it be under ten; because by the constant practice of the exchequer it hath been held a covenous lading; and so frequently decreed: but in that case the king cannot seize, but may relieve himself in the court of exchequer-chamber.

III. In what manner to be paid or received.

(1.) Although the usual expression of prisage when a ship laden with 20 ton is, that one ton shall be taken for prisage behind the mast, another behind the mast; yet the king or his butler not bound to take them in that order, but may take them behind or before the mast: for otherwise the merchant might deceive the king by covenous placing of his wines; and this is the circumstance; for if there be but ten tons aboard, the king shall have one for his prisage: and that was accordingly resolved upon demurrer H. 8. Jac. B. R. Kenicot et Bogan, reported justice Yelverton.

(2.) The king is to pay for every ton taken by way of prisage 20s. which, as it seems, is for freight.

(3.) The wines taken by the king or his farmer for prisage ought to be discharged of custom and subsidy; for prisage is a kind of custom itself, and it is no reason that custom should be paid for custom. If it should be paid by the merchant, he should be charged for custom for what belongs not to him but to the king; and it is impossible, or at least improper, for the king or his farmer to pay it to himself.

(4.) If ten several merchants lade in one ship each of ten tons of a several kind of wine, the king may seize which ton he please, though it may be double the value to any of the rest; and the merchant, whose wine is seized, shall have average, or a reasonable contribution, from the other merchant whose wines are spared, by decree in the court of exchequer-chamber.

IV. As to the time when it becomes due.

(1.) It is not due by the lading of the wines aboard in France or Spain, or other foreign countries.

(2.) It is not due by the coming into the narrow seas, or the king's dominions.

It hath been doubted, whether the duty be not due by the importation into the port.

9. *Jac. B. R. Waller and Hanger*, reported by divers reporters*. The citizens of London are by charter free from prifage. A citizen having wines at sea and others in the port dies before the bulk broken.

1. It was held first, that for the wines abroad at sea the executor should be chargeable, because the duty is not due while they are *vina civis*; though others thought, that the executor in right of representation should be discharged of the prifage when of those, when afterwards unladen.

2. As to the wines in the port, the court was divided. Two justices held, that the duty was not due till bulk broken, though the goods were in the port; and consequently, the executors being citizens at the time when the duty became due, they should not partake of the privilege granted to citizens.—The other two held, they should be discharged by virtue of the privilege granted to the citizens. First, because they supposed the duty due by the bringing of the wines into the port by way of merchandize, or at least so far fixed that they might be said to be *civium* at least when the duty was fixed, though perchance unloading might be a circumstance requisite to the ascertaining and compleating of the duty. Secondly, because the executor standing in *loco testatoris* is possessed in right of the testator; and so though the duty should not be compleated before bulk broken, yet at that time they were *bona civis*.

And though the court of king's-bench were divided in opinion, yet before that, *M. 6. Jac. in Scaccario*, it was ruled, that the executor should be discharged of prifage; but principally upon the last reason, because the executor hath the wines in right of him that was a citizen; but not upon the point of the compleating of the duty by the importation into the port.

When bulk is broken, then, and not till then, prifage is due. For till then the merchant hath not sufficiently ascertained whether he means to trade in that port, and it may be he may go to some other harbour: but when bulk is broken, that is, when the goods or part of them are unladen to be laid on land, then is a plain evidence appearing that he means to fix on this as his port. And accordingly the law hath been always held, that

the case is very fully reported in 3. Bullstr. 1. 1. Ro. Rep. 138. and Cathr. It is also reported, but not so much at large, in Mo. 834. It is cited and cited in 1. Sid. 130. and Hardr. 302.—EDITOR.

if the merchant unlade any part of his wines, though he unlade not all, yet prisage shall be paid for the whole lading of that ship.

Claus. 40. E. 3. m. 22. pro Stephano Ward. The entry upon the record appears to be thus: The prince as earl of Chester had prisage of wines unladen within any port of Chester. Stephen Ward, merchant, brought some wines from Bourdeaux to Liverpoole in Lancashire, *et certa pars vinorum eorundem ibidem discarasset, ac Ricardus de pincerna noster prisas nostras de omnibus vinis in eadem navis instantibus ad opus nostrum recepisset.* The merchant went to Portchester in Cheshire with the residue of his wines, and the prince's officers demanded prisage of those wines that were brought thither; which were prohibited by the king's writ, because the prisage was lawfully paid to the king for the whole ship's lading, though some part were unladen.

And that is the meaning of that writ, *1^{ma} Pars Pat. 28. E. 3. m. 21. Rex omnibus salutem. Quia de solutione prisæ nostræ in regno nostro Angliæ, &c. quoties et ubi fieri debent, non vertitur in dubium; nos, ad tollendum hujusmodi dubium, vobis omnibus quorum interest, innotescimus per præsentem, quod ubicumque infra regnum nostrum Angliæ navis aliqua vinis carcata applicaverit, et prisæ nostræ de vinis illis semel ibidem rite soluta fuerit, et de solutione prisæ prædictæ per litteras pincernæ nostri vel alio modo legitimo constare poterit, si navis illa cum vinis illis alibi in regno postea applicuerit, prisæ nostræ prædictæ de vinis prædictis non debet.* *Claus. 31. E. 3. m. 11. pro mercatoribus Hiberniæ.*

For where the bulk was first broken, the prisage was taken for the whole lading.

And with this agrees the resolution of the case of Kenyon and Bogdan, *H. 8. Jac. B. R.* before cited. In trover and conversion for a ton of wine, the defendant pleads, that the king seized in right of his crown of the prisage of wines, viz. out of every ship importing into any port from any parts beyond the sea ten tons of wine, one ton; and out of every ship importing 20 tons into any port *et ibidem exonerat.* two ton, the one before the mast, the other behind the mast: and then shews the grant of the office of chief butler to sir Thomas Waller to take prisage, &c. and that there were imported from Bourdeaux into the port of Exeter 20 ship 20 ton of wine, and that nine of them were unladen; that two ton were due to the king for prisage, and that the defendant took them and converted them, &c. Upon demurrer these points were resolved:

1. If a merchant import 20 ton of wine, though he unlade but part, yet he shall pay prisage for the whole; for the bulk be once broken, it sufficeth to the king for all the prisage.

2. Although his plea be special for all unladen, yet it is good enough to entitle the king if part be unladen.

3. That though his plea be special, viz. for one before the mast, another behind, and the averment be general, yet the plea is good; for the king may take his prisage in any part of the ship.

And although by the statutes of 28. E. 3. cap. 15. 20. R. 2.

4. and the first rule in the book of rates, if a merchant unlade bulk and unlade part of his goods, he shall not pay duty or custom for the residue; yet these laws extend only to customs and subsidies, and prisage comes not under the name of customs in those acts; and therefore if bulk be broken in the ship he shall pay his prisage for the whole lading. And it hath been accordingly used, though it seems it ought to be intended of breaking bulk of part of the wines, not of other commodities of the ship's lading.

But in some cases the breaking of bulk, or unlading of part of the wines, doth not entitle the king to prisage for the rest, in these cases:

1. In case of necessity. As if the mariners unlade part of the lading for reason of a tempest or leak of the ship; this is no breaking of bulk to entitle the king at least to his full prisage of the residue, because not done to the intent to trade, but for necessity.

2. In case of a custom or usage.—*Trin. 33. E. 1. B. R.*

85. *Hibernia*, the custom of payment of prisage in Dublin. The use there is, if a great ship laden with wine come for the port of Dublin, because the haven is not able to bear a great vessel with his full lading, they use to unlade part at Dalkey, and send it in by lighters into the port of Dublin, and no prisage is paid for this till the ship is come with the rest of his lading; and then the king's officer takes his full prisage of the wines brought in by the lighters, or of the rest of the ship's lading, at his election, but the sale to be made by the merchant till the prisage paid.

And thus much shall serve touching the time when the duty is due.

Touching the remedy for prisage, the proper remedy is to be by the king's officer; and thereby the property is secured. But if the officer be hindered from seizure, or if the king's duty be stolen and not paid, it doth not induce any seizure of any of the other goods that come, as it doth in case of customs, as shall be shewn in due time. But the king

king or his farmer may have an action of trover and conversion; or an information lyes against the merchant to recover the value, and against those that hinder the king's officers seizing the prisage, whereupon the party convicted shall be fined and imprisoned. And this is frequent at this day, very ancient. *Vide Hill. 7. E. 1. rot. 14.* the case of the bot of Melfa, against whom an information was exhibited at the king's-bench for hindering the king's officer to take *prisam vini domina regi spectantem, viz. de una dolio vini antea lulum et alio post malum.* *Vide Hill. 13. E. 1. B. R. rot. 2. fol. 101.* But for customing wines in the names of those that are free from prisage, a punishment is ordained per statute 1. H. 8. c. 5.

And thus much also for the remedy. Only I shall add that in case of covinous or fraudulent parcelling of wine, lading of above 9 ton and under 10 ton, whereof before, the usual remedy hath been by English bill in the exchequer chamber, being a court of revenue; where, if the fraud appears, the value of the wines justly due for prisage hath been commonly decreed to the king or his farmer against the merchant importer.

Touching the discharge of prisage, and the liberty of prisage translated to a subject, which are the points remaining for the absolving of the enquiry touching prisage, it shall be declared in the next chapter.

C A P. III.

Touching exemption from prisage, and the translation of the same to a subject.

THE duty of prisage is a prerogative of revenue belonging to the crown, as hath been said in the former chapter. But yet it is not so inseparable from the crown, as personal to the king, but that it may be discharged or transferred. In this chapter therefore I will set down these things, viz.

I. How it may be discharged.

II. How transferred.

I. Touching the discharge of prisage I will set down these things:

(1.) The manner how it may be done; and

(2.) Who are those that have the discharge of prisage, and how far that discharge extends.

(1.) Touching

1.) Touching the former of these, how this discharge be had, I shall set down the learning thereof in these following propositions.

1. A man cannot have a discharge of this duty simply by prescription; because it is an inheritance due of common right to the crown. And so it was accordingly ruled *M. Jac. in Scaccario*, in the case of the town of Fowey in Cornwall.

2. Though a man cannot have a discharge thereof by a simple prescription, yet he may in some cases have it by prescription by reason of another thing. As he that hath a county-palatine by prescription, may have a discharge of prisage by prescription; for he may by prescription have a discharge in point of perannuity, as shall be shewn.

3. A man, or town, or corporation, may have a discharge of prisage by charter; and this is without all question, as shall be shewn. If the king grant to the mayor and commonalty of the city of London, *quod omnes civis civitatis predictæ* shall be free of prisage, though the charter be granted to the corporation, yet the exemption is well transferred thereby to particular persons; and so in case of discharge of toll, of putting into juries, and the like privileges of discharge.

But, 4. Although the king may grant an exemption from prisage, yet it ought to be by special words mentioning prisage; for general words of all customs, or words relative to the liberties of others that have that exemption by special charter, will not serve.—*Vide* the case of the Venetian merchant cited by Tanfield, Davis Rep. 17. to have been adjudged in the exchequer. The king grants to a Venetian merchant, that he should be quit *de omnibus rusticis subsidis et impositionibus et omnibus aliis denariorum summis debitis et solubilibus pro quibuscunque mercandiziis importatis*; and that he shall be as free as the citizens of London: and by colour of this he claimed to be free of prisage; because by special charter the citizens of London are free of prisage. Yet it was adjudged, that this did not discharge him of prisage; because prisage is not specially expressed in the same grant.—Perchance the case might be of butlerage; because merchant-strangers have an exemption from prisage. But be it one or the other, it will be alike in both; for neither butlerage nor prisage will be discharged without special words.

As touching the second matter, viz. who have such a discharge of prisage, and how far their discharge extends. It is, there was once an attempt, that all the king's subjects should have been discharged of prisage, paying for every tonne priseable 20d. and for every pipe 6d. at the ports of charge, as aliens paid. *Rot. Par. 16. R. 2. n. 29.* And it came

came near to a bargain ; for the king's answer was, *s'il n'eust payé deux souldz per chescun tonnel de vine permy le realme bien deins franchises come de hors, le roy voet qu'ils soient quitte sa prise, et si non soit use come devant.* But neither after effect ; and so it stands as it did before.

There were three great bodies that had an exemption of prisage.

1. Merchant-strangers who by the *carta mercatoria* of E. 1. which we shall see hereafter mentioned at large, were discharged of prisage, and by contract were to pay *nomina tumæ 2s. de quolibet dolio vini quod adducent vel adduci faciunt intra regnum*, which 2s. per ton is commonly called butlerage.

2. The charter of exemption granted to them of the cinque ports, 1. E. 3. viz. to be quit of toll *per totam terram et testatam nostram ; et quod non ponantur in assisis ratione fivint tenuræ contra voluntatem suam ; et quod de propriis vinis suis quibus negotiantur quieti sint de restâ prisâ nostrâ, viz. de dolio vini ante malum, de alio post malum.* It is true, that the cinque ports claimed an exemption of prisage long before prescription, but it was never fixed till this charter, viz. C.

1. E. 1. m. 5. Touching this exemption, it is to be observed

1. That this exemption from prisage, did not extend to butlerage, neither doth at this day : and therefore, *Comunia P. 7. E. 3. in Scaccario, inter Rodman de Poole, cernam regis et Petrum Garcy, et alios comburgenses de Sancto* it is resolved, that where a merchant alien was made a freeman of one of the cinque ports, yet he ought to pay butlerage ; for the alien was discharged of prisage by a contract paying 2s. per ton ; and the exemption granted to the cinque ports expressly from prisage, would not be construed to extend to butlerage, which was another thing, the arising in respect and compensation of prisage.

2. That this exemption extended, and extends at this day only, to those wines that are brought into the cinque ports : and therefore, if a merchant of one of the cinque ports import wines into his own port, or any other of the cinque ports, he shall be discharged of prisage, by virtue of the charter ; for as they claim and have their liberty by one common charter, so they are to this purpose but one common port ; and so the freeman of one of the cinque ports shall have the exemption in another of the cinque ports. But if a freeman of the cinque ports import wine by way of merchandize into the port of London, or any other out-port, not parcel of the cinque ports, he shall pay prisage ; for the privilege was given in respect of place principally, and not of the person. And accordingly it was ruled upon great debate in *Camerar. Scaccarii*, *Jac. in Swinerton and Thornbull.*

3. It doth extend only to such as are truly members of the cinque ports, and pay scot and lot there; and therefore anciently those of the cinque ports were fined, if they did colourably admit any person to be a freeman of their ports, that was in truth no inhabitant, merely to gain the privilege, viz. *si advocare voluerint aliquem de libertate suâ esse qui non est.*

The third charter of exemption is that which was granted to the city of London in the same year, viz. 1. Ed. 3. which runs thus: *Pro melioratione civitatis nostræ London, &c.* *Quod iidem cives nostri de auxiliis et contributionibus, sicut homines burgorum, et quod contribuant cum communitate nostri sicut homines comitatum **; et quod de omnibus aliis talibus sint quieti; et quod nullus captor faciet aliquam prisam in civitate prædictâ vel extrâ de bonis civium, nisi statim debitam faciesolutionem; et quod de vinis civium nulla prisâ fiat per aliquem nostrorum nostrorum, vel hæredum nostrorum, seu alterius, contra voluntatem, viz. de uno dolio ante malum, de alio dolio retrò, seu aliquo alio modo, sed inde perpetuò sint quieti. Prohibemus etiam, quod nullus officarius, seu provisor nostri, hæredum successorum nostrorum, mercandizet infrâ civitatem vel extrâ.

Upon this charter the same conclusions are to be made as in the former of the cinque ports, viz.

1. That if an alien become a freeman of London, yet he is chargeable with butlerage, notwithstanding this exemption.

2. That a freeman of London shall not, by virtue of this charter, be discharged of the passage of wines imported in Bristol, or any other out-ports; but his discharge extends only to wines imported into the port of London, whereof he is a citizen. It is true, that *Rot. Parl. 11. H. 4. n. 73.* Haucer, being then the king's butler, exhibited a petition to parliament for the declaring of this exemption to extend only to citizens *resient et demurrant deins le citty*; which was accordingly declared. But in that petition he recites, that they of the cinque ports and London are *enfranchises en telle bien et franchement aller avec leur vines là, ou leur plerra, parmy le realme d'Angleterre, sans ascun prise à nostre signior le roy ent paier.*

But as in the case of the cinque ports before mentioned, it is ruled, that the exemption of the cinque ports did not ex-

the preceding passage is exactly agreeable to the manuscript. But I think, the manuscript is erroneous. In the published charters of London, the grant of the passage here intended to be given is, that the citizens, "shall be taxed contributory with the commonalty of our realm as common persons, and not as of the city; which word *not* I take to be necessary to the sense of the charter, though not conformable to the transcript of Lord Hale's manuscript.---

tend to wines imported into other ports; so in *Michaelmas* Car. 1. in the exchequer-chamber, between Sir William Waller and ———, a case was made upon an English there preferred, wherein the question was, whether the exemption of the citizens of London, by the charter of the E. 3. or otherwise, did extend to wines imported by them Bristol or other the out-ports; and after several arguments it was *unâ voce* resolved by the barons as followeth, viz.

1. That the king, by special words, might exempt citizens of London from prisage in the out-ports; viz. the words had been *quòd de vinis civium nulla prisage infra civitatem vel extra*, as some other exemptions in the same charter are penned, viz. that of exemption from purveyance without present payment.

2. But that this exemption from prisage doth only extend to their wines imported into London, and not into the out-ports. First, because the charter is granted *in tuâ civitate*, not *personæ*; for it is *pro melioratione civitatis*: but this privilege should extend to the goods of citizens imported in the out-ports, it would carry the trade of wine from the city. Secondly, because in the clause preceding touching purveyance, and subsequent touching purveyance the words are express, *tam infra civitatem quam extra*; whereas the words, omitted here in this clause, evidence that it should be extendible *extra civitatem*. Thirdly, because prisage is an ancient revenue of the crown, and the charters of exemption thereof shall be construed strictly, and so it has been in all ages; and therefore it was decreed for the king and his farmer, answerable to the case of the exemption of the cinque ports before recited.

3. That *bona civium* must not be intended of every man of London. But first, he must be a freeman of London. Secondly, he must be a freeman and inhabitant of London; for though he be a freeman, yet if he inhabit not of London, he shall not be exempted from prisage for the wines imported into London. And accordingly it is declared by that judgment of parliament, Rot. Parl. H. 4. n. 73. *Est declare per le roy per avise des seigniors et lement, que nulle n'ait ne enjoy se tiel franchise en cest cas ne soit citizen resident et demurrant deins mesme la citty, ne tous autres demurrants en autres cittytes burghes ou villes enjoyssent leur franchis eux graunt, s'avant tout dit à nostre seignior le roy son inheritance in cest case*; and accordingly it was agreed in Hanger's case, 9 Jac. B. R. before cited. Thirdly, he must not only be a freeman and inhabitant, but must also be a house-holder within the city. And then P. 43. Eliz. in Snede and Sacheverall, a freeman of London living in London as an inmate, shall not have his exemption for such a man contributes not to scot and lot, nor

official to the city; and this privilege was granted *intuitu ci-*
uitatis, not *personæ*; and the grant being in diminution of
the king's revenue, shall be construed as strictly as may be,
and the word *civis* be taken in as restrained exposition as it will
bear.

And thus much concerning the business of discharge of pri-

Touching the right of having prisage in pernaney.

1) It is clear, that, by an express charter of the king, pri-
may be claimed by a subject, as well in point of inheritance
for a term of years. And this hath been agreed in all those
wherein the king's farmer of prisage hath been plaintiff or
defendant: but then as in case of a discharge, so much more in
of a grant, there must be express mention of prisage. Ge-
120. v
130.

words of *omnes consuetudines*, or *custumat*, or *prisas nostras*
in villa, will not carry this royal franchise, 6. H. 3. 51. in
case of the archbishop of York. For the king had certain
primary duties in ports, that were called *prisæ*, as *prisæ*
maris, *prisæ bosci*, &c. but the prisage of wines is commonly
called *prisam vini*, and most commonly *rectam prisam vini*.

2) Touching a title to prisage by prescription, it seems it
cannot be acquired barely by prescription without a charter to
have it. For as a discharge of prisage is not acquirable by
prescription, because it excludes the king of a fixed settled pre-
sumption; so much less can it be acquired by a bare prescription
in point of pernaney; for that doth not only deprive the king of
his lodgeth it in another person. But,

Such a kind of prisage, as consists with his majesty's *recta*
may be acquired by prescription; because it doth not ex-
clude the king's duty, but superinduceth another consistent with
it, possibly, might that be which we find mentioned
6. 51. *per Aldelm.* * allowed to the archbishop of York; who,
when he disclaimed the king's prisage, claimed the first *tas* and
under the name of prisage, which was allowed to him; for
as only a prisage in name, not that *recta prisam vinorum*,
of we have hitherto treated.

In the case of the archbishop of York touching the prisage
itself, appears to be thus.—The king grants to the pre-
late of the archbishop of York, *prisas suas in aqua de*
la city, &c. In the eyre of 15 E. 1. the king brought a *quo*
retorn against the archbishop of York, to set forth by
warrant he claimed *prisas de vine* in the port of the
city of Hull. The archbishop came in person, and said,

He was one of the speakers in the case here cited; but Schard was the coun-
sellor of the archbishop's claim.—EDITOR.

K

thae

that he claimed nothing in the prise of wines *per nosme de de vines eins le primer tast et achate de vines*. And after the 4. E. 3. in eyre upon a new *quo warranto* against the bishop for the *primer tast et achate de vines*, il dit, qu'il elai *primer achate et tast après le prise de roy des vines*; et dit, *et tous ses predeceffors ont estre seifies de temps dont memory*. After this the archbishop, upon the vein of his charters, notwithstanding these disclaimers, pretend title to the very sage of wines, viz. one ton before the mast and one ton be Upon a *quo warranto* against the archbishop for the prise of wine, the archbishop made default; and thereupon the franchise was seized. Upon a petition in parliament the archbishop was put into possession, upon condition that he should answer the king a *quo warranto* for prisage. A *quo warranto* was thereupon brought against him in the commons-pleas, which we find in *Hil. 6. E. 3. fol. 11.* The bishop made his title to prisage the before-mentioned charter of *prisas suas in aquâ de Hull* averred that he and his predeceffors had enjoyed prisage of wine ever since. For the king those judgments in eyre were allowed and judgment demanded, inasmuch as the king's charter had in special words *prisas vini*, whether it passed. Judgment was given for the king, wherein these points were resolved, viz.

1. The general grant of *prisas nostras* will not of themselves extend to pass prisage of wines.

2. Though possibly a long usage of enjoyment of wine under such an ancient charter, might have expounded the charter to extend to prisage, if there had been nothing else in the charter, yet a charter within time of memory of *prisas nostras*, wherein the archbishop himself of record had disclaimed to have prisage by virtue of that grant, is a stronger evidence against the usage, that it hath not that interpretation.

3. But it seems there admitted, that such an ancient charter with an immemorial usage concurrent had been a good title; but the plea being entered *ut supra* judgment was given for the king, *M. 6. E. 3. fo. 51. Vid. Claus. 7. E. 3. m. 14.* a kind of sequestration of butlerage and prisage of the port of Hull, between the king and the archbishop, that plea determined.

But after this judgment the bishop sat still and claimed no prisage; though, as to the franchise of the port and other things by him claimed in the water of Hull, he brought actions, and was awarded, *Michaelmas 14. E. 3. R. R. Rot. 24. Ebor.*

2. Though possibly prescription alone is not sufficient to title to prisage, yet it may by prescription belonging to a count palatine that is by prescription.

Upon this title the earls of the county-palatine of Chester enjoyed prisage of wines in the port of Poole, being a port of that county-palatine. *Claus. 40. E. 3. m. 22. pro Stephano Ward.* The case is cited above upon another occasion.

Upon this title also the bishop of Durham claimed, and for what appears enjoyed prisage of wines in his port, *Communia. 6. E. 3. Northumbr. Memorandum, quod cum dominus rex de coronâ suâ habere debet rectam prisam suam de vinis applicantibus in regnum suum, viz. de quâlibet nave carcatâ viginti doliis et amplius unum dolium ante malum et aliud dolium retrò malum, et ad opus regis per camerarium vinorum suorum, pro 20s. annis pro doliis illi qui vina illa adduxit: idemque dominus rex, et progenitores sui quondam reges Angliæ, prisam illam percipere et habuerunt à tempore quo non extat memoria, absque eo aliquis alius prisam illam in regno prædicto percipere debet seu debeat.* The king's butler, being opposed thereupon why he claimed no prisage for the port of Hartlepoole; answered; that he was hindered by the bishop of Durham. Thereupon the bishop came in by process, and claimed the prisage in that port to belong to him in right of his bishoprick; viz. *quod ipse et omnes predecessores sui, à tempore quo non extat memoria, hujusmodi prisas percipiunt ibidem prætextu libertatum ecclesiæ Dunelm. prædictæ; et demandant judgment whether he shall be put to answer without warrant.* The case depending upon several adjournments, the bishop dies.—By this record two things appear:

1. That in the time of E. 3. there were payable two ton of wine in the county, not two of thirty, as is surmised in the petition of the second of Henry 4. above-mentioned.

2. That as the bishop of Durham claimed prisage in the port of Hartlepoole in right of the county-palatine by prescription, he factually enjoyed it.

And thus much shall suffice concerning prisage.

C A P. IV.

Concerning the customary duties, that are or were anciently due in ports by usage or custom.

THERE were anciently very many duties due in ports which were usually called *consuetudines* and customs, which belonged to the king either as incident to his customs or as perquisites of the crown, as also to other lords and owners of ports either by charter or prescription.

Customs incident to the customs.—Such were the customs the cocquet, whereof before, viz. two-pence of every merchandise exporting wools. And thereby it seems to be questionable in resolution of the case of Waterford, whether the grant of *cocquet civitatis vocat.* the cocquet should carry the great customs. the stile of the accompt was *de exitibus cocketti.* But that may be said for it is, that under that grant they had long enjoyed the great customs, which expounds the charter to extend to that name.—The custom of tronage, viz. 2d. ob. for every hundred of wool, whereof before.

Customs by prescription belonging to ports, were various according as the usage and custom was.

Some were in respect of ships or vessels themselves, as came into the port; as anchorage and culage or keelage, were certain sums taken for the ships, in some places more, in some places less. *Vid. P. 40. E. 3. Rot. 73.* The earl of Arundel, as lord of the town and port of Poole, claimed by prescription *quasdam custumas, viz. pro anchoragio et culagio de quacunque nave in portu predicto applicante duos denarios, et diversas custumas, &c.* and brought his action for disturbance.

Again, some were in respect of goods imported into the port. Thus, in the former record, the same earl claimed by prescription *diversas alias custumas, viz. de quolibet dolio vini in portu predicto applicante duos denarios, de quolibet dolio aleis rubeculi applicante duos denarios, de quolibet mille aleis rubeculi applicante unum denarium;* and brings his action against them that disturb him in collecting them. Such were those prises or customs belonging to the king in his port of Newcastle, which are before recited out of the record of 20. E. 1. and such were the petty customs of goods imported, which were anciently assigned to the king in the port of Exeter; and they hold the same parcel of their farm unto this day, viz. *de quibus infra.* These are those prises that are taken by the town of Hull under the title of their fee-farm, whereof *vide stat. 27. H. 8. cap. 33. H. 8. cap. 33.*

Some were in respect of their measuring of commodities imported, which were measurable by the bushel, commonly bushelage, claimed as before by the bishop of York in the case of Hull, *M. 44. E. 3. B. R. ubi supra,* and enjoyed by the king in the port of Plymouth, as belonging to the crown of Trematon.

These, and such like customary duties as these, were anciently answered to the king and other lords of the port, and they came under the name of *consuetudines portuum* and would pass by the general grant of *omnes consuetudines*

ta pōriū de D. and a charter of exemption of toll-passage et consuetudine tam per terram quam per aquam would have given exemption from them; for they were little else but tolls, and of the same nature; and accordingly these words in the antient charters, mentioned in Davis's Rep. 16. *et alibi*, and especially in old charters, had relation to these customary duties. But these are not properly customs. The difference stood principally in these things:

1. These were settled by prescription and usage in several ports; and therefore varied according as the several customs in several places obtained. But customs were regular and certain in all places; I mean such as were truly such.

2. These belonged to the lords of several ports, whether it were the king or a common person, as we see in the instances before given. But customs belonged to the king, and to the king only, as the revenue and support of his crown.

3. These would be discharged by the charter of the king to the owner of the port by a grant to be quit *de theolonio passagio adagio et omni consuetudine per totam terram, &c.* But such a grant would not discharge from payment of custom, as is observed in the case of customs, Davis 16. Yet these customary tolls or duties came anciently under the name, not only of *consuetudines*, but customs, as appears before in this section: and, as before observed, these ancient exemptions *ab omni consuetudine tam per terram quam per aquam*, which were frequently granted, were intended to be applied to these customary payments.

The fullest account of this kind of customs is in an old book mentioned, called *Consuetudines et Usus Sandwichi*. It began to be written in the year 1301, anno 29. E. 1. by John Champneys; but it is continued down by several authors down unto the middle of Edward 3. and after.

In that book it appears, that in the year of Christ 1023, Knute gave to the monastery of Christ-Church Cantuar. *sum monachorum, portum de Sandwich, et omnes exitus ejusdem ab utrâque ripâ fluminis, cujuscunque sit terra, à Pipernesse Martell Fleet, ita ut natante nave in flumine, cum plenum fuerit [quâ] longius de nave securis parvula, quam Anglici vocant [pote] super terram [projici], prout ministri Christi, recepti accipiant. Nullusque homo omninò habeat aliquam consuetudinem eodem portu, exceptis monachis ecclesiæ Christi. Eorum autem parvula, et transfretatio portus, et theolonium omnium navium, quæque sit, undecunque veniant. Si quid autem in magno mari*

*mari extrâ portum, quantum mare plus se retraheret, et adhuc
ram unius hominis tenentis lignum, quod Anglici naminant Spre-
tendentis autem se, quantum potest, monachorum est. Quicquid
ex hâc parte medietatis maris inventum et delatum ad Sandwich
sive sit vestimentum, sive rete arma ferrum aut argentum, medi-
monachorum erit, altera pars remanebit mercatoribus.**

Under this charter the monks of Christ-Church held the
of Sandwich until 21. E. 1. and then the king took it in by
of exchange *Pat. 21. E. 1*

The king therefore, having the port under the grant of
prior of Christ-Church, and his successors after him, had
only the great customs of wools, woolfells and leather, and
petty customs by virtue of *carta mercatoria* (for these he had
right of his crown, whose-ever the port is; and these were
lected and answered by his customers); but besides these
king, as lord of the port of Sandwich, held such customs
consuetudines as the prior had before as lord of the port.

The difference between these customs of *consuetudines* there-
fore were these :

1. The true and proper customs were such, as the king had
in right of his crown. But these *consuetudines* were such
the prior had before the exchange in right of his port
and the king had afterwards as lord of the port.

2. The true and proper customs were by act of parliament
as the great customs; or by contract, as the petty customs.
But these were settled by prescription, first in the prior
the charter of king Knute, and after in the king by exchange
with the prior.

3. The true and proper customs were collected and answered
ed by the customer. But these *consuetudines* were answered
by the bailiff of the town, first to the prior in his time
after to the king.

4. The true customs were of greater value than the
we shall find, that wools, woolfells, and leather, which
swered the great custom of 6s. 8d. and 13s. 4d. answered
smaller customary payment.

These things will more evidently manifest themselves
account itself of these customs, as it is entered, and accounted

* In the *Decem Scriptores* there is a piece intituled, "*Evidentia Ecclesie Cant.*" which contains a collection of charters to Christ-Church, Canterbury, from 1016 to the reign of Hen. 1. and in this collection the charter of king Knute is traced from by lord Hale is included; but the two copies differ very much. Dec. Scriptor. Coll. 2225. In Lord Hale's transcript of the charter, there is to be some omission, to supply which the words between crochets are taken from the transcript in the *Decem Scriptores*.—EDITOR.

as answered by the bailiffs of Sandwich, 12. H. 4. Rot. 200.
The title is thus in the book, fo. 40.

*Et oportet, quòd sciatur de his, quæ ballivicus facere debet
jure ex officio suo, ut dicitur postea, si ipsi colligere debet per
vel servientem suum aut per custumarium ad hoc assignatum
custumam domini regis in hunc modum linguâ Gallicâ scriptum.*

Some of the many particulars follow, for some of them are so
pure I cannot understand them.

	£.	s.	d.
thescun tonnell de vin de Giens	-	-	0 0 8 ob
thescun tonnell de vin de isliens	-	-	0 0 4
thescun tonnell daysel	-	-	0 0 4
thescun tonnell de Bresse	-	-	0 0 4
And so for divers other things measured by tons.			
thescun cable	-	-	0 0 3
thescun uptegh	-	-	0 0 1
thescun shete	-	-	0 0 1
thescun notherope	-	-	0 0 0 ob
thescun menn cord	-	-	0 0 0 ob
thescun neise achate	-	-	0 2 0
thescun battel vendu	-	-	0 0 2
thescun ray a harringe	-	-	0 0 1
thescun ray a makerell	-	-	0 0 0 ob
thescun poys de sit	-	-	0 0 2
thescun poys de surmage, &c.	-	-	0 0 1
thescun cent de sturgeon	-	-	0 0 4
thescun cent de samon	-	-	0 0 4
And so for fish.			
thescun daloum	-	-	0 0 2
And so for spices of all sorts.			
thescun bale de drape by	-	-	0 0 4
thescun drape de leyn hors de bayl	-	-	0 0 1
thescun jac de leyn	-	-	0 0 2
thescun drap de ling tiel	-	-	0 0 0 ob
thescun cent onnes de cannas	-	-	0 0 4
And so for fruits, dyeing stuff, &c. at several rates.			
thescun last de quires	-	-	0 0 4
thescun dere de quires	-	-	0 0 2
thescun peaux de berbys	-	-	0 0 4
And so for various kinds of leather and furr at various			

<i>De chescun neif à custumer qt. ele viont doutre le mere</i>	£.	s.
<i>De neife que va per le costere de Angliere en chescun } quarter de lan</i>	0	0
<i>De chescun home que passe le mere</i>	0	0
<i>De chescun home ove chival pur se et son chival</i>	0	0
<i>De chescun chival sans home</i>	0	0
<i>De chescun chien veigaant ou alant</i>	0	0
<i>De chescun beef</i>	0	0
<i>De chescun pore</i>	0	0
<i>De chescun agne</i>	0	6

These be some of those many payments that are there due to be the bailiff's account; and accordingly I find this now the foot of the particulars in an old hand:

Nota in comput. Johannis Rogeri et Ballivorum Sande anno 12^o. regis H. 4. Rot. 250. Compolus Ricardus de prædictis custumis.

Somewhat of the like nature I have seen in an ancient manuscript book of the customs of London, written about the time of king E. 3. which mentions several kinds of customs or tolls long to the city under several titles, viz. *Custumas de Saffeld, Cusuma vici portus de Namby*; and under this latter after many particular customs of vessels laden with herrings, mullet, makerell, congre, are these customs, viz.

<i>De chescun neif que set à tra durra de strandage</i>	£.	s.
<i>Et un petit neif de harlocks que seit atra durra</i>	0	0
<i>Et battell que set à terra durra</i>	0	0
<i>De 2 quarters de blée mesmes per le quarter le roy</i>	0	0
<i>De un commble de blée que vent per le lag</i>	0	0
<i>De chescun quartre de weyde issant hors de citty per le Ew</i>	0	0
<i>De 2 quartres de carbons de memefures per quarter le roy</i>	0	0
<i>De chescun tonnel de ce voys issant ou mere per merchants stranger</i>	0	0
<i>Si null estrange mesne hors de là citty mulnel per Ew durra de 100</i>	0	0

Merchant estrange mesne leyne outre le mere payer per un saak que tient 2 peises 6d. et pur cockett 2. Et s'il n'a plusieurs saaks de 2 peises, il payer pur le premier sak 6d. pur chescun des autres 5d. Et si merchant eit plesours saaks que tenient 2 peises et demy, ou 3 ou 4 pysses, il durra de primer saak 11d. et pur chescun des autres 10d. et tous jours pur aver le cockett durra 2d.

	£.	s.	d.
merchant meyne outre le mere bure ou oynt, durra			
sur le primer peys 1d. ob. et de outre peyses ob.			
pour chescun peys de furmage issant outre mere	0	0	4
chescun last de quires issant outre mere et de			
chescun daire de quire 2d. et de quire noumper	0	0	0 ob
chescun trussel de quire en cares	0	0	4
chescun c. de penax lanus	0	0	4
chescun trussel ly eu cordes de quel merchandise			
quel soit petit ou grand	0	0	4
barbois de fishpond	0	0	1 q ^a .
chescun trussel de draps issent ouer grand ou petit	0	0	4
chescun tonel de vyn que custom deit	0	0	1
chescun grant ueif. q ^e . set a tra	0	0	2
chescun tonel de meel q ^e . custom deit	0	1	0
chescun cave de pluma issant outre mere per			
me estrange	0	0	4
un li de leyn a foren ob. de 2. peaux launts ou			
plus ob. de 100 ob. de un lib. de filas leyn ob.			
un cisors ob. si mil foren port leyn peaux ou			
de a la value de 10d. ou plus pair ob. q ^a .			
merchandises q ^e . sont peyses per le balance, de			
100 durra ob. et nient pluis jesque a miller, et			
100 durra 1d. et 1100 durra 1d. ob. et nient			
pluis jesque a 2000, et dunque durra 2d. et avant.			
and these seem to be in the nature of tolls. But the citizens,			
by charter quit from tolls, pay not these duties; and the			
stranger is not intended only of aliens, but foreigners, or			
as are not freemen of the city.			
thys it appears, that in some things these ancient tolls and			
in, in London, Sandwich, and other ports, agree, and in			
things they differ, as will appear by comparing the sums.			
et length of time hath made great alteration in these tolls.			
tolls by water, in London, have been usually demised to			
water-bailiff in farm. And very late, in the exchequer,			
water-bailiff brought an action against a foreigner for the			
wines brought into the port of London; and upon the			
produced many old records to prove this custom due, viz.			
per tun. But inasmuch as he could produce no proof of			
such custom paid; but, on the contrary, great evidence			
given by the merchants, that the toll or custom was never			
ended, which yet would have risen to a very great sum in the			
viz. 2000l. or 3000l. per annum, at length the plaintiff			
consulted.			

I shall

I shall only add the petit customes of Exeter, which claimed as parcel of their fee-farm, by grant made by king unto them of the port of Exeter, *cum membris*, and the of Exmouth, and lastage and stallage of the said ferry, as were decreed unto them by default in a suit between the and commonalty of Exeter and one Wade, 9 Feb. Hill. 14. 2. as followeth.

9. Feb. Hill. 14. Car. 2.

Bailiff and commonalty of Exeter against Wade.—Sets the city holden in fee-farm at 20l. *per ann.* rent by the chart. E. 3.—That the port and haven of Exeter, and ferry of mouth, and lastage and stallage of the ferry, are parcell of farme.—That they are used to take under the name of petty toms of all goods, imported into that port in ships, boats, other navigable vessells, these duties following, under the name of petty customes or town customes;

	£.	s.	d.
For every 100 weight of sugar	-	0	0
For every 100 weight of madder	-	0	0
For every 100 deal-boards	-	0	0
For every bale of packing canvas	-	0	0
For every 100 of cable yarn	-	0	0
For every tun of rodd iron	-	0	0
For every hoghead of wine-lees	-	0	0
For every 100 of twyne	-	0	0
For every hoghead of strong-waters	-	0	0
For every last of pitch	-	0	1
For every 100 of dressed flax	-	0	0
For every dozen of stone-cupps	-	0	0
For every piece of tufted Holland	-	0	0
For every 100 weight of latten-wyre	-	0	0
For every hoghead of salt	-	0	0
For every piece of lockorum	-	0	0
For every ream of white paper	-	0	0
For every hoghead of Rhenish wine	-	0	0
For every 100 weight of hops	-	0	0
For every fatt of wooden ware	-	0	0
For every 1000 of bricks	-	0	0

Directed to be tried at law, and in default of the defence proceeding decreed for the plaintiff.

which by king Edward and the barons, as in the barons' Hill. 14. And by this it appears, that although these were called customs, and possibly they were all that were anciently answered as customs, yet they were quite of another nature than those which are now, or in the time of E. 1. were truly so called. And they became a customary duty by prescription and usage in nature of toll, and connected in point of property by usage and prescription to the lord of the port. And the king, together with the lord of Sandwich, had doubtless these customs or tolls as incident or belonging unto it. And they were quite of a different nature from those which were really customs; for we well know the custome of wooll by denizens was 6s. 8d. but here was answered only 2d. The custom of three hundred woollfells was 6s. 8d. but here was answered only 4d. for one hundred. The custom of a sack of wooll was 13s. 4d. but here was answered only 3s. 4d. And at the same time both customs were answered by the customers and collectors; and yet this customary toll was answered by the bailiffs.

L. s. d. Indeed it may be possible, that in the infancy, as it were, of customs, and before they were reduced to so considerable advantage as afterwards happened, viz. in the times, possibly, of king Stephen and H. 2. these were the only customs that were paid; and having so continued for a long time, they might grow into a fixed and customary duty: and though possibly, afterwards, some other customs or advances thereof might be introduced that were of great value, the other might be retained. As we see hath happened in former times, though there were new subsidies granted, yet the old poundage settled by *carta mercatoria* might and did continue: and so it might happen, that possibly these kinds of port duties were, in ancient time, all the customs that were answered, and that by new provisions there might other more considerable customs arise, and yet the old be retained under the name of tolls, or it may be under the name of customs; and being grown inconsiderable in length of time might be granted to the several corporations of those ports or towns wherein they were taken as part of their farms; as was done in the cases of Exeter and Yarmouth, Kingston upon Hull, and some other ports, which enjoy such like customary payments as part of their farms, sometimes by the name of tolls, sometimes by the name of petty customs, and the like; the crown being in no condition easily to spare such little inconsiderable sums, when customs of a greater value were either taken by tolls settled upon it, as it happened in the time of king John, H. 3. and other succeeding kings.

2. c.

C A P. V.

*Concerning the king's customs, and how they stood before
time of king Edward 1.*

I COME now to that which I principally intended, viz. a
gal history of the king's customs, properly so called;
therein I shall proceed according to the series and order of
and the kings reigns.

After the beginning of the reign of king Edward 1. the
toms were well settled in a regular way; and the monu-
thereof, both in respect of their original and progress, are
tant of record, and are capable of a fair deduction downwa-
But before the beginning of the reign of king Edward 1.
times were tumultuous and unsettled, and the records relating
those customs are either not to be found, or otherwise they
very brief, dark, and uncertain.

Yet I shall endeavour in this chapter to collect and put to-
ther what memorials I can find concerning the customs be-
the time of king Edward 1. and what may be collected from
them touching the same; and the enquiries shall be these:

I. Whether there were any customs settled in the
besides that of prisage before the time of king Edward 1.

And,

II. If any, what they were.

I. Touching the former of these enquiries, viz. whether
were any customs due to the crown before the time of king
ward 1. it seems with some clearness, that there were; but
in that great proportion, nor in that regular way of collection
that they were afterwards.

And here the question is not intended of such customary
tations as were answered to the lords of the ports by usage
prescription, whereof in the former chapter. For with
question such payments were very long due, though they
possibly vary in several ports, as is before observed, and
were frequently called customs and *consuetudines*. But
were petty small matters; and of this kind these seem to
Placita 11. H. 3. in *Arce Lond. Rot.* 5. and *Pat.* 34. E. 1. m.
dorso, where the customs of ships and other things in Lon-
land belonging to the town of Yarmouth are recited; and *Pl.*
ta de juratis, 47. H. 3. *Rot.* 38. *dorso*, the customs in the
of Seaford in Suffex, then belonging to the earl Warren.
Pat. 33. E. 1. p. 1. m. 8. for the customs in the cinque ports

MS. but besides these, it appears plainly there were other duties of
 ter moment answered to the crown; and it is said in the
 book of the Admiralty, fo. 16. that they were reduced by
 John to a certain rate. The words of the book are, *que*
haban fist un ordinance, que un manner de custume soit prise
out le realm de Anglitere en ewe. And hence it is, that in all
 ancient safe-conducts, that were granted to foreign mer-
 chants, this clause is inserted, *faciendo debitas antiquas et rectas*
etudines; as to those of Gaunt *Cart. 43. H. 3. m. 2. of*
 enburgh *Pat. 46. H. 3. p. 2. m. 2. to the Spanish Merchants,*
47. H. 3. p. 1. m. 11. and Claus. 48. H. 3. m. 3. to
 of Brunswick *Pat. 51. H. 3. m. 31. of Hamborough ibidem,*
 of Ipres *Pat. 57. H. 3. m. 15. dorf. of Britain Pat. 54.*
m. 14. of Lovain Pat. 55. H. 3. m. 15. of Orleans Claus.
1. 7. dorf. of Sienna Pat. 3. E. 1. m. 21. all which were
 re the settlement of the great customes, as shall be shewn.
 and to this purpose may be produced the account of Cheshire
 boomsday. *Vide Selden Titles of Hon. 620. Cart. 1. Jobannis*
m. 26. dorso, concerning the free trade of merchants-
 gers; *Rot. oblat. 3. Jobannis m. 4.* concerning the customs
 ristol; and *Pat. 6. Jobannis m. 11.* ordinances concerning
 French merchants; whereby it appears, that during the wars
 France, all merchandizes, except corn, wine and salt, ex-
 ed into France or imported from thence, paid the fifteenth
 of their value during the war. But it seems, by these or-
 nances, the generall custom of merchandizes, as well woolls
 hers, was the twentieth part of their value, *Pat. 17. Jobannis*
 touching the merchants of France; and the discharge of
Carta. And Rot. Pat. 50. E. 3. m. 22. n. 60. the king
 ed to prince Edward certain customs, viz. *rationabilis aliqua*
 of the merchandizes. And in Sir John Davis's Reports,
 mention is made of a pipe-roll of the time of H. 2. *Viccomes*
et Suff. reddit compot. 451. 16s. 6d. de consuetudine navium
ford. And in the pipe-roll of 5. R. 1. *Albertus de Billings-*
debet 72s. consuetudine de Billingsgate et Buttolsgate, though
 latter seems to be only a toll, not a custom. *Vide Dyer 65.*
 the stat. of *Magna Carta, cap. 30.* grants, that merchants
 come into England *sine aliquibus malis tolnetis per antiquas*
has consuetudines.

debitus

and besides these fixed and settled customs, it is apparent, that
 were temporary impositions, or rather subsidies, answered
 crown. *Pat. 50. H. 3. m. 22. n. 60.* the customs granted
 prince; *et m. 28. Pat. 57. H. 3. m. 1. Pat. 51. H. 3. m.*
Pat. 54. H. 3. m. 10. Pat. 3. E. 1. m. 29.

So

So that as to the first point certain it is, that besides the duties incident by prescription to the several ports, whether the hands of the king or of a subject, there were customes answered to the crown; and those customs did not come under name of toll; nor a charter to be quit of toll did not exempt discharge them; for they were clearly of another nature: 39. 3. 13. the case of the men of Marlborough and Southampton.

But though it be very plain, that there were customes, those also of a considerable value, yet what they were is difficult to determine; and the rather, because we have no custom accounts that can be found in the pipe before the time of E. 1. Yet we must try what we can guess.

II. Therefore as to the second inquiry, what was answered and for what goods.

(1.) Touching goods imported there was some custom answered; and principally of these two kinds.

First; for wines imported, besides the duty of prisage, there was answered to the crown, both in king John's time and a considerable duty, viz. eight-pence upon every ton, which in the single port of Southampton was then farmed at 20 *per annum*; which in the very intrinsical value of the most allowing twenty-pence to an ounce, would at this day amount to 600l. *per annum*. This appears by the book of 39. E. 3. And there it is admitted, that this is custom, and not toll; neither is it discharged by the acquittal of toll. And for such custom it was, that *Pat. 38. H. 3. m. 2.* is released to merchants of Bourdeaux by the name of *exactio et tonellorum*, except a kind of tonnage of wine then in use with this clause also, *tamen consuetudines denariorum, singulorum doliis in diversis portibus impostæ, à mercatoribus persolvantur eodem modo et eadem formâ, quâ secundum diversitatem portuum solvi extitit consuetum.* Vide in the case of Poole before, Earl of Warren had 2d. for every ton that came into the port, and possibly it might be a part of that 8d. which the king had. And thus much for wines.

So it might possibly and very probably be, that some custom was answered the king in nature of poundage for goods of a verdupoise. We see it was so answered to the earl of Warren in Poole, viz. *de quâlibet centenariâ ponderis denarios*. And it seems that some such custom or imposition was answered to the king in the times of H. 3. and the beginning of E. 1. of other merchandizes imported as well as denizens as strangers. *Pat. 50. H. 3. m. 22.* the king granted to the prince, that merchants-strangers may come into the kingdom with the licence of the prince, and upon the condition

conditions; *quod de omnibus mercandis, per ipsos vel quos-
que alios, in regnum nostrum venientibus vel regno nostro
venientibus, aliquam rationabilem portionem percipiet, unde mer-
tores super medium non graventur.* And Pat. 3. E. 1. m. 29.
deputation bearing teste 27 Martii issued to the merchants
Lake ad quandam consuetudinem, per totum regnum Anglia,
rebus et mercimoniis infra, idem regnum venientibus, usque
Febr. Pasche proxim. futur. capiend. sicut prius fieri con-
suevit. So that a custom inwards was answered till that time;
and possibly it might be discharged upon the grant of the
great custome of woolls and leather in that year; for I find
nothing answered by subjects or aliens for merchandizes
imported between the 3. E. 1. and 31. E. 1. when the *carta
mercatoria* was granted, besides priilage.

And thus much touching customs of goods imported.

1.) Touching the custom of goods exported, and therein
especially of woolls.

It is certain, that in the ancienter times, especially in H. 2.
R. 1. time, there was a great trade and manufacture of
cloth here in England, and the great mart for the vent of Eng-
lish cloth was the fair of St. Butasse or Boston; and this ap-
pears by the History of Hoveden, who mentions the great
disturbance that happened among the merchants of that fair,
because of the strict measure of cloth that was then put in use
in the time of Ricardi primi.

2. By the statute of *Magna Carta*, cap. 25. concerning
the measure of cloth of russet and other.

3. By those many guilds of weavers in many of the great
towns at very considerable rents, which after, as the
manufacture decayed by the civil wars, got allowance and de-
duction of their farms, as in London, Lincoln, Oxford,
and divers other places. And some little footstep there is of
this trade by the Tinctors of Rippon by custom, that none
dye cloaths there but those of their fraternity. Re-
fer to the Statute of Ricardi 1. And accordingly the guild of *Telarii*, London,
by virtue of their ancient charter from H. 2. which I have
seen, and the usage thereupon, have power to restrain any
weaver, not being of their guild. And therefore it might
possibly happen, that in those times the custom might not be
answered for woolls but for clothes; because it seems the great
commodity of wooll might in those times have been made into
cloth.

4. In the times of the distempers and civil wars in England
in the times of king John and H. 3. that manufacture was in
great

great measure lost; and the woolls were transported into foreign parts, and there turned into cloth. So that if in these times there should have been no custom answered for woolls, which was the greatest commodity of this kingdom; there was nothing that could have answered the king a considerable custom inwards; and therefore it seems probable, that there was a custom outward answered for woolls exported.

And indeed it is apparent it was so, though I have not seen with the certain proportion that was so answered; for the Statute of 51. H. 3. called *Statutum de Saccario* doth expressly mention it, and provide how the collectors thereof shall account, viz. *et les principalls gilliers des customes de laines payeront les deux termes avantant, tous les deniers qu'ils ont receus et prises de l'avant dit custome, et de an en an rendent au Roy apertement de tous les parcells receves per tous les ports et tout le terre, issint qu'il responne de chescun neise, ou de charge, et combien ele portera de laine, et d'autre charge le neise de que custome est due, de tout le rescit.*

By which it is apparent, that there were customs of woolls, though it appears not what was the proportion that was answered; neither can I discover it, though I have made a strict search after customers accounts in the times of H. 3. and in the following times.

The remedy for the customs at the common law seems to be only a distress of the goods of the merchant. *Vide* account done 39. E. 3. 13. in the case of Southampton. But for the 3. *Johannis m. 4.* a mandate issued to the constable of the castle of Bristol to seize the ship and goods of a merchant who had concealed his custome, and thereby to levy double the value of the customs, and double the damage that the king had sustained for want of them. But this was an extraordinary arbitrary remedy. The proper remedy for the duty itself was the exchequer; for there was no law then for a forfeiture of goods, that I have seen.

And thus much shall serve for an essay touching the customs in that dark time that was before king Edward 1. Only thus much is to be added, that all or the most part of the various customs so antiently used vanished, as to subjects born, by the custome of wooll and leather settled 3. E. 1. and as to aliens the great contract or *carta mercatoria*, 31. E. 1. and were afterwards answered*.

* Mr. Madox, in his History of the Exchequer, gives a chapter on the nature of the customs, during the same early period as is here undertaken by me, which I remind the reader of for the sake of connecting all the materials published on this dark part of the subject. Mad. Excheq. c. 18.—Editor.

C A P. VI.

narrative of the customs, and their several originals and alterations, as they stood in the time of king Edward 1.

COME to times of some more light, viz. the reign of king Edward 1. who was as wise a prince as ever ruled this com; for he builded up this kingdom by good laws and wise government; out of the ruins and desolations which a long civil war had introduced; and the first thing he began with was to settle trade, and a certain revenue to the crown, by a more regular and settled rule and establishment of the customs. The foreigners and aliens had indeed gotten all the trade of the woolls of England into their own hands; and thereby increased it wholly into their own power.

The king observing this, and withall having a design to settle the customs as well as to rectify this disorder in trade, in the entrance into his reign issued a proclamation, that no woolls should be exported out of the kingdom. Touching the legality of this inhibition, if made without consent of parliament, I say not here. But howsoever it at present served the purpose designed by it.

2. E. 1. m. 19. *verso*, a strict commission issues to enquire what woolls were exported against that inhibition, and by what means, and whether done after notice of this inhibition. There being this restraint upon the exportation of woolls; it was now seasonable to set on foot a settlement of the customs, and principally to be charged upon that commodity.

Because the country and the merchants, being under this restraint, would in all probability be more yielding to the relaxing of the customs upon these commodities, that by the restraint might be removed; and the ports open to the exportation.

Because by this means there would be in all probability a great proportion ready to be transported, as soon as the ports should be open; and thereby the intended customs would be the greater, at least upon the first opening of a liberty of exportation.

After, viz. in the parliament of 3. E. 1. which was the first parliament which is called Westminster the first, held *crastino pasche anno 3. E. 1.* as appears by the preface of the statute made for the settling of the great custom of woolls, L.

woollfells and leather, upon the crown, and then and for thirty years after it was called *Nova Custuma*.

This act is entered *inter fines* 3. E. 1. m. 24. Pat. 3. E. 1. and *Originalia de anno* 3. E. 1. in the exchequer, and in the red book of the exchequer fo. 356. which, because it is the foundation of that great custome, and doth explain many difficulties and rectify many mistakes concerning the customs, I have thought fit to insert *verbatim* as it is in record, viz.

De Nova Custuma Lanarum Pellium et Coriorum in originali anno 3. regis F. R. H.

Ala novele custume, ke est graunte par tous le graunz, del realme par la priere des comunes des marchaunts de tout Engleterre, purveu, ke en chescun conte, ou la grem'ore vile ou port est, estut deus de plus leaus e plus pussaunz, ke averont un de un seil en garde, en un, ke sera assigne par le roi, e un autre pece, e seront jurez, ke leaument rescourront e redonneront des deniers le roi, cest asavoir de chescun sak de demi mark, e de chescun treis cent peauls ke sunt un sak mark, e de chescun last de quyre un mark, ke isceront le realme, ausi bien en Hyrlaund en Wales come en Engleterre, de fraunchise e de hors. Esire ceo en chescun port, ou nest isfir, seront deus prodes hommes jurez, k'il ne sufferont laynes peaus ne quyres sanz leatre overte a la seel, ke ches port en le counte. Et s'il est mil ke autrement sent del realme, ausi bien il perdra tout les chateus k'il a, e sera a la volente le roi. Et pur ceo ke ceste chose ne esire per furing, est purveu, ke le roi enveie ses lettres vesconte per tout le realme, e fait crier et defendre par contes, ke nul, sor forseture de son cors e de touz ses ne face mener hors de la terre laynes peaus ne quyres fesse de la Trinite en cest an, et adunkes par lettres overte seaus si com est andudroe encime autrement sir les avantures fetures. Et le roi ad graunte de sa grace, ke touz les seign par quy porz laynes ou quyres isteront, averont les se quant eles deviendront, chescun en sun port, sauve a mark de chescun sak de layne e des peaus, e un mark de last de quyres. And accordingly *verbatim* Finis 3. m. 24.*

* On account of the great curiosity and importance of the preceding the *Originalia* of 3. E. 1. I compared the transcript here given with the now in the custody of the Treasurer's Remembrancer of the Exchequer, it is as exactly conformable to the original, exclusive of the punctuation, which in that, and of the abbreviations, as was possible. Mr. Chapman, the Remembrancer, most obligingly assisted me on the occasion. The extract in the *Originalia* of 3. E. 1. m. 15. which in the margin is marked No. 12. extract from the record begins with the words *A la novele custume*.—ED.

and according to the purport of this inhibition of exportation in the time limited by this act, divers merchants-strangers were sett at great fines for exporting of woolls contrary to that inhibition. Their fines were sett in the king's-bench, and entered in the accounts of the collectors 4. E. 3.

Upon this record many things are observable, which give a clearer light to the whole business of the great customs; and by the original of many things concerning the same are discovered, which without this would be obscure and dark.

1. By this record it appears, that these great customs are not by prescription, as is said in Dy. 165. but it had its origin in the time of king Edward 1. and it then was called *Nova Custuma*, and continued that stile until the 22. E. 1. when a new inhaunced custome of woolls was sett, called *Nova Custuma*, as shall be shewn; and then and not till then the custome of woolls, woollfells and leather, took the name of *Antiqua Custuma*. And this appears by very many records, viz. in 14. E. 1. m. 19. it is called *Nova Custuma*, and all the collectors accounts from the 4. E. 1. until the 28. E. 1. of these great customs are stiled *Computus, &c. de Nova Custuma*.

Indeed about 22. E. 1. the king had sett a new imposition on woolls of 40s. a-sack; and then the former was called *Antiqua Custuma*. And this maltolt was called *Nova Custuma*; and shortly after, when that maltolt was abrogated by parliament, there came in the *Carta Mercatoria* of 31. E. 1. where the small customs were settled in the crown, which were sometimes *Nova Custuma*. So that the great customs of woolls, woollfells and leather settled 3. E. 1. kept their title of *Nova Custuma* till the great imposition of 40s. per sack in 22. E. 1. and then that took the name of *Nova Custuma*, and the former lost the name of *Nova Custuma*, and became *Antiqua Custuma*: and when that imposition was taken away, yet the customs of 3. E. 1. did not resume their name of *Nova Custuma*; neither could they, for there presently succeeded the *Carta Mercatoria* in the 31. E. 1. which settled a new course of customs on strangers, and was frequently called *Nova Custuma*.

The second thing observable is, that as this custom began in 3. E. 1. so it began not by imposition of the king, nor by imposition with the merchant, but by act of parliament—its transcript in the fine roll and the red book of the exchequer, if it be not the very tenor of the act, yet it is the very substance and matter of it. There are no parliament-rolls of parliament, nor for many after; but the very same thing *idem verbis* is entered *inter Originalia de anno* 3. E. 1. and *Finium* 3. E. 1. m. 24. And accordingly *Rat. Parl.* 3.

L 2

E. 1.

See Mas.
Excheq. cap.
10. 1. 5. p.
537. 4. fol.
ed. note

E. 1. m. 1. and likewise *Brevia 16. E. 1.* cited by Sir Edward Cooke in his comment upon *Cap. 30. of Magna Carta**, also *Claus. 26. E. 1. m. 8.* do all recite the original of the great custom to be by act of parliament, viz. *Cum prelati nates et tota communitas quendam novam consuetudinem nobis heredibus nostris concessit de lanis pellibus et coriis, viz. de lane dimid. marc. de trecentis pellibus dimid. marc. de lapiis 13s. 4d.* And therefore it is a mistake in those that thought this custom to be by the common law †; for certainly it began in the time of king Edward 1. and began that time by the strength of an act of parliament. Vide also the same purpose *Pat. 4. E. 1. m. 1. et 19. Pat. 5. E. 1. 14. Pat. 6. E. 1. m. 20. Fynes 10. E. 1. m. 5. Claus. 10. E. 1. m. 5. Claus. 14. E. 1. m. 19. Claus. 16. E. 1. m. 9.* all which and many more do stile it *Nova Custuma*.

3. In the first institution of this great custom, we have institution of the collector and comptroller, viz. the *deans des homes*, which offices have been hitherto kept with the addition of a searcher, and in the port of London a surveyor; whereas anciently the customs in the ports were received by the king's bailiffs or port-reves.

How these officers are to be appointed, and for how long, and what their duty is, see the statutes 1. *H. 4. 13. 4. 20. 13. H. 4. 5. 1. Eliz. 11.* and other statutes relating to their office and employment.

4. Together with the institution of the great custom of wool, woollfells and leather, we have also the institution of the cocquet, or acquittance testifying the payment of them. This custom began and continued with those great customs, and did not concern in truth any other; so that by common appellation it was called the custom of the cocquet; and the town of Waterbury claimed and enjoyed the great custom by the grant of the king, called the cocquet. *Davies' Rep. 7, &c.* The custom was a testimonial in the king's name, under the king's seal, put for that purpose, testifying the payment of the custom. There were anciently two parts of the seal; one kept by the sons thereunto appointed, as appears by this grant; and the other part by the comptroller. But in process of time the seal was entirely kept by the comptroller, or by the customer and comptroller.

* 2 Inst. 59.—EDITOR.

† This opinion is to be found in *Dy. 165. b.* but Lord Bacon allows it to be a mistake; though he was an advocate in parliament in favor of the crown's claim to the duties at the ports by prerogative. See Lord Bacon's speech in vol. xi. of his *Trials*, p. 37. However, Sir John Davies, in his book on *The Question of Impositions*, is not so conceding; but argues, that what is called a grant of a custom by parliament to the king, was only a diminution of the old one by that parliament. See p. 44. of that book.—EDITOR.

he answered the king a casual profit, for which the collector answered upon his account as well as for the customes, viz. of every merchant shipping out these customable goods, two-pence, which the collector of the customs answered upon his accounts yearly, from 3. E. 1. until the time of H. 6. and after, *de exitibus sigilli, quod dicitur cocquet.* This testimonial the payment of customs is the warrant for the searcher to search the ship and goods; and regularly, when this was once done, the subject was discharged. *Vide Rot. Parl.* 45. E. 3. 3. 46. E. 3. n. 23.

and the want of this was sufficient for the searcher to seize woolls, woollfells, and leather exported without this warrant; the common stile of the seizures of merchandizes of this time was, *quia non cocketteta nec custmata.*

We have the place or port where the customes ought to be paid, and the seale of the cockette deposited. It was not in every port, but in the chief part of the country; which yet the ports were used to enlarge, to ease the merchants of that trouble, and sometimes the cockette was lodged in two or three ports in the county, where a merchant might pay his customs and have discharge. But still the designation of the ports was in the king's power, which created a great dependence in the merchant on the king, as to these customes; for he could not export without a cockett, but they were subject to a forfeiture; a cockett he could not have but where the king had lodged the cockett, which gave the king a great opportunity to hold the merchant to hard terms.

We have the punishment of exporting the merchandizes without paying of the custom. The merchant forfeited all his goods, and his body was at the king's pleasure, viz. subject to imprisonment. It was not only a forfeiture of the goods, but of all his own goods; and this severe punishment was applied only to these great customes, and not to the lesser customes, for they were under gentler punishments, as will be shewn.

But, besides this punishment, process of time introduced a new punishment, which was constantly put in use*, viz. if the master or owner of a ship did lade aboard any wooll, woollfell, or leather without a cockett, the ship itself was forfeited, at least if the master was privy to the fact (but this concerned only those merchandizes of woolls, woollfells and leather, and not any other kind of merchandizes); and accordingly this was frequently put in use. *Claus. 13. E. 3. m. 15. Claus. 38. E. 3. m. 13. pro Johanne Ball. Claus. 39. E. 3. m. 20. pro Johanne Henrys. Claus. 29. pro Johanne Tbrusco,* and infinite more of that kind.

* Claus. 31, E. 3. m. 5.

And

And therefore the statute of 38. E. 3. cap. 8. was made to prevent that inconveniency, viz. that whereas the ships of divers people be arrested and holden forfeit, because of a little thing put into their ship not customed, whereof the owners of the said ships be ignorant; it is accorded and assented, that no owner shall lose his ship from the 15th day of February next coming for such a small thing put in the said ship, not customed without his knowledge.

But this severity did only extend to woolls, woollfells, leather, and not to other sorts of goods uncustomed, and so remember it was agreed M. 3. Car. in the exchequer; for in other cases only the goods uncustomed were forfeited, and not the ship or other goods, unless otherwise particularly provided some special act of parliament in particular cases, which we shall in due time meet with.

7. We have the persons to whom the forfeitures were given viz. to the king, if in his own ports; but if the forfeiture was in the port of another lord, the forfeiture is given to the lord of the port, saving to the king his custome so concealed.

This was a fair *bonorarium* given to the lords of ports; but we do not remember that ever I have read in any case that they enjoyed it. In a little time the king's interest and concernment was over-ballanced, and carried the forfeiture to the king, together with the duty.

8. Here is the extent of this custom thus granted. It was only to England and Wales, but also to Ireland: and by virtue of this act of the parliament of England, the kingdom of Ireland was charged with those customes; and it is under that right the king held these customs in Ireland, and holds them to this day.

It is true, shortly after this grant the king did remit it sometime in Ireland, and made an abatement for the same to the merchants of Florence that farmed it. *Claus. 7. E. 1. m.* But it soon was resumed and hath ever since continued, and continued under this and no other title, for any thing I have yet seen or read. *Vide Davy's Rep. fo. 8. et sequentibus* the exemptions granted to Waterford.

9. We have the things that are charged with this custom, two great commodities of the kingdom, wooll, woollfells and leather.

For wooll, this was the great native commodity of the kingdom, and indeed the basis of all the commerce of the kingdom.

At the time of the grant of this duty it was free for English aliens, to export woolls to any place; but subsequent laws *sub modo* restrain, and at length wholly restrained the exportation so that at this day there can be no custom to the king in woolls, because the exportation thereof now stands totally

hibited under great penalties. The progress of that inhibition was this :

By the statute of 11. *E. 3. cap. 1.* the exportation of wooll, by denizens or strangers, without licence of the king and his council, is forbidden under the pain of death.

By the statute of 15. *E. 3. cap. 6.* liberty is given to all merchants to export woolls paying the ancient customs ; and to the same purpose is the statute of 18. *E. 3. cap. 3.*

By the statute of the staple 27. *E. 3. cap. 1. et 2.* merchants-strangers may buy woolls at the staples and transport them ; but by *cap. 3.* English, Welch, and Irish, are prohibited to transport woolls, under pain of death, and loss of goods and lands. By the statute of 36. *E. 3. cap. 11.* free liberty of exportation of woolls granted as well to denizens as strangers, paying the ancient customs.

By the statute of 38. *E. 3. cap. 6.* the penalty of death upon transportation enacted by 27. *E. 3.* repealed ; but the forfeiture of lands and goods to stand in force. By the stat. 43. *E. 3. cap. 1.* the staple removed from Calais to the former places settled by 27. *E. 3.* By 12. *R. 2. cap. 16.* settled at Calais.

By the stat. 1. *H. 4.* the staple of wooll, woollfells, leather, lead, and tin, as fixed it Calais.

By the stat. 3. *H. 5. cap. 6.* the staple continued at Calais, customs paid here, and securities given by the merchant to carry staple commodities to Calais. By the stat. *H. 5. cap. 2.* every merchant stranger buying woolls in England not coming to the staple to be sold, shall for every sack of wooll deliver in to the Mint an ounce of gold.

By the stat. 18. *H. 6. cap. 15.* carrying of woolls, woollfells, leather, lead, or tin, by any person other than to the staple of Calais, without licence of the king, felony, unless to the streights of Morocco. What progress it had after, see the stat. 4. *H. 4. cap. 14.* *E. 4. cap. 3.*

So that the staple continued at Calais for aught appears until it was lost in queen Mary's time ; and consequently the exportation of staple commodities to any other place under an inhibition ; and then Calais being lost to the French, the inhibition stands universal, unless in those places which are particularly excepted.

But to clear all question, by the late act of 12. *Car. 2.* there is a general inhibition of the exportation of wooll under most severe penalties ; so that at this day the old custome as to wooll and woollfells import nothing ; because the exportation of them is utterly prohibited at this day, and consequently no custom

custom arising thereby. And the case stands the same as leather; for by the statute 18. *Eliz. c. 9.* exportation of leather is likewise inhibited. Only by the late act of tonnage and poundage, 12. *Car. 2.* calf-skins of a certain weight are permitted to be transported.

But by the last rules of the book of rates at this day, during the continuance of the subsidy of tonnage and poundage, these ancient duties for woolls, woollfells, and leather, and all other ancient duties upon merchandize, other than such as are imposed by that act or excepted, are put in suspension.

Now what woolls were intended within this custom, see *Rot. Parl. 8. H. 6. n. 47.* a petition that lambs wooll shortly and scalding be not esteemed chargeable to the great custom of wooll and woollfells; but it obtained not.

10. We have the time when the custom grows due, when laden on board to issue out of the realm. Therefore they were shipped to be transported to another port within the realm, no custom due. But yet in such case surety ought to be given for the transporting of them to that other port, otherwise they ought to deposit their customes till they bring a certificate of their lading them within the realm. *Clas. 7. E. 3. p. 1. m. 24. Stat. Stapul. 27. E. 5. cap. Rot. Parl. 9. H. 5. pars 1. m. 33.*

11. We have the quantity and the proportion to be taken, viz. for a sack of wooll six shillings and eight pence, for woollfells six shillings and eight pence, for a last of herring mark. And herein we are to observe, that though the proportions be here fixed, yet the constant usage hath always been, that the king should be answered his customes proportionally as for half a sack or half a last, or for 150 woollfells.

Now touching the quantities themselves what they are, the old statute * called "*Compositio de ponderibus,*" *superiorum constat ex viginti daker, et quodlibet daker constat ex cem coriis.* According to the same statute, *saccum lane constat ex duabus wagis, waga ponderat quatuordecim petras, et petra constat ex duodecim l b.* so that a sack of wooll according to the estimate weighed 392lb. And 300 woollfells were estimated to answer a sack of wooll, and therefore charged with the same custom, viz. 6s 8d.

* 31. E. 1.—In Mr. Ruffhead's edition of the statutes, this ancient writing is titled *Tractatus de Ponderibus et Mensuris.* By the context it appears to be rather an explanation of the weights and measures by reference to the statutes of the realm than a statute of itself.—EDITOR.

But by the statute of 25. E. 3. ft. 5. c. 9. the sack, which before weighed 28 stone, is now reduced to 26 stone; and every stone 14 pound; which amounted to 364 pound, viz. less than the old sack by 28 pound.

And possibly the old sack even in those former times was accounted too large; and therefore upon all the old accounts in the times of king E. 1. and king E. 2. there was answered upon every sack of wooll *ob. et. q^a*. viz. three farthings more than the custom of the demy-marke, in a particular account, viz.

Et respondent de 3lb. viz. de quolibet sacco lanæ ob. et. q^a. which I think was not taken when the sack was reduced by the stat. of 25. E. 3. to 26 stone.

A pockett of wooll contained half a sack, and so did a erpler, whereof frequent mention occurs in record. A todd of wooll is two stone, viz. 28 pound.

12. And lastly, we have the sum that was answered, viz. demy-marke for a sack of wooll, demy-marke for 300 wooll-bells, and a marke for a last of leather. The penny then weighed three-pence now; and consequently a mark then amounts in bullion at this day to forty shillings, which in regard of the rates and valuation of things is now more than twice what it was then. That, which was then worth forty shillings, is now worth above six, nay above ten pounds. And this seems to be about the twentieth part of the value, as things were then. See *Rot. Parl. 17. E. 3. n. 17.* the valuation of a sack of wooll in every county. The medium seems to be about ten markes at that time.

And thus I have made a short survey of this great foundation of the great customes, and of the severall considerations that arise from the same; and now I shall proceed in the next chapter with the progress thereof, and what farther occurred relating to the business of the customs in the time of king E. 1.

C A P. VII.

The further prosecution of the business of the customs in the time of king Edward 1.

THE king (Edward 1.) having thus settled the great customs, in the very next year takes care for their collection and improvement; and having borrowed 23,000*l.* for his commissions of the merchants of Lukes, the great customs are committed to them through all England and Wales, and Ireland upon account.

They held the great customs of England and Wales from 4. E. 1. inclusively until about the 20. E. 1. The sum of account of the great customs of Ireland for the three first years arose to 5171*l.*

The medium of the revenue of the great customs in England rose to between 8 and 9000*l. per annum*; for instance,

<i>A Festo Dunstani anno septimo ad idem Festum</i>	<i>£.</i>
<i>anno 8. E. 1.</i>	8108
For the next year ending 9. E. 1.	8588
For the next year ending 10. E. 1.	8694
For the year ending 11. E. 1.	10271
For the year ending 12. E. 1.	9098
For the year ending 13. E. 1.	8094

besides some ports omitted in their former accounts, which in all these years arose to 409*l. 7s. od.*

For the year ending 15. E. 1.	8023
For the year ending 16. E. 1.	8860
For the year ending 17. E. 1.	9974

But as trade increased, so in all successions of this king and his successor's reign, the revenue of this and other the great customs increased.

But if we take an estimate thereof in the time of H. 6. there is an account given of the whole revenue, and of among the rest, viz. *Rot. Parl. 11. H. 6. n. 24**. when we were charged also with a subsidy, as shall be shewn, the great and petit customs did not amount to above 7000*l. communis annis*:

<i>Viz. Anno 10. H. 6.</i>	<i>£.</i>	<i>s.</i>	<i>d.</i>
<i>Anno 11. H. 6.</i>	7780	3	1
	6980	16	0

* This curious estimate is in the printed rolls of parliament, v. 4. p. 434.—

thus the customes stood untill 22. E. 1. But the king, having occasion for money for the warrs in France for the recovery of Gascoigne, treated with certain merchants, and there was a composition upon woolls, woollfells and leather, which was in Nova Custuma, viz. de quolibet sacco lanæ fractæ 5 marcæ, de quolibet sacco alterius lanæ vel pellium lanatarum tres marcæ, de quolibet lasto coriorum 20 marcæ; which afterwards in the same year was reduced to a lower proportion, viz. for every sack of wooll and woollfells of any kind tres marcæ; and thus it continued for some time, as shall be shewn.

This appears in the account of 28. E. 1. which is thus

Impetus Petri Barton et Jobannis Hufwicke Collectorum Novæ Lanarum pellium et coriorum apud Kingston super Hull. —
nam anno 22. mercatores regni in subsidium guerre, quam rex recuperatione Vascoine contra Gallicos intendebat, de lanis et coriis regnum, regi gratanter concesserunt, viz. de quolibet sacco lanæ fractæ quinque marcas, de quolibet sacco alterius lanæ pellium lanatarum tres marcas, de quolibet lasto coriorum 10 marcas; quod quidem subsidium rex post modum gratiosè mitigavit, et concessit 150. die Novemb. eodem anno 22. finiente incipiente anno omnes mercatores tam regni quàm aliunde, mercatoribus Franciæ duntaxat exceptis, lanas suas pelles lanatas et coria mercandizas ad partes traducere possint, ita quòd regi de quolibet lasto tam lanæ fractæ quàm alterius, et etiam pellium lanatarum, tres marcas, de quolibet lasto coriorum ducendorum ad easdem partes de marcas persolvant à vicesimo nono Julii 22. E. 1. et usque ad Sancti Michaelis tunc prox. sequent. et ab eodem Festo usque ad Natalis Domini anno 25. incipiente pro tempore. Rex amodo dictum Jobannem, viz.

	£.	
Anno 23	-	6199
Anno 24	-	4061
Anno 25	-	544
		} In that port of Hull.

on complaint of this imposition, the statute of 25. E. 1. Confirmationem Cartarum was made; and by that statute it is enacted, *E pur ceo que tous le plus de communalty durament greve de le maltolt des leines, cestavoire de cbescun le leine quarrants soutz, et nous ont pryés que nous les voudre- relever; nous a leur pryen les avouns pleniment releffe, et nous a grant pur nous et pur nos beirs, que cele ne autre mes ne nous sans lour comun assent et leur bone volunt, save a nous et beirs la custome de leynes pealx et quires avant grant per le alty avantdit. Test. Sc. 10 OA.*

Upon

Upon this act these things are observable :

1. That, notwithstanding this imposition was by act of the merchants, yet it being without consent of parliament it was not legall, and the king himself stiles it no other than maltolt. The like instances we shall after have 21. E. 3.

2. That there was by the act a special clause, that these impositions in the future should not be laid without consent of parliament. And yet these inland commodities were so ready hand to be charged upon emergent occasions, that there were sometimes the like illegall maltolts imposed. But upon complaint they were removed, and the like provision made against future charges of that nature without consent in parliament 15. E. 3. cap. 1.—Merchants shall have free passage for woolls and other merchandizes, paying the customes of the time used. 27. E. 3. st. 2. cap. 1. & 2.

3. That the old subsidy of woolls, woollfells and leather which before this new imposition were at first granted to the king by parliament, as is before observed, [is saved*.]

The great custome of woolls, woollfells and leather, which before this new imposition of 22. E. 2. was called *Nova Custuma*, now changed its appellation, and was after this called *Magna Antiqua Custuma*.

After this the old custome, viz. for a sack of wooll *demy mark et pro 300 pellibus lanatis, quæ faciunt unum saccum, demy mark et de la so coriorum continente 20 dactres et quolibet dactre centum 10 coria, unam marcam*, was answered; and accordingly an account passed for the year ending 24 Nov. 26. E. 1. as appears by the accounts of the collectors of the customes, and the same stood untill 31. E. 1.

31. E. 1. the king granted to merchants-strangers divers liberties and exemptions, as, namely, of prisage, murage, &c. And in consideration thereof the merchants-strangers granted to the king divers new customes, commonly called *Parva Custuma*, viz.

Of every ton of wine imported by them two shillings, commonly called butlerage, because it came in lieu of prisage.

Of every last of hides by them carried out of the kingdom over and besides the ancient custome, demy mark; so that the whole custome of an alien for a last of hides was 20s.

Of every sack of wooll by them carried out of the kingdom forty pence, besides the ancient custome; so that the whole custome of a sack of wooll was 10s.

Of every 300 woollfells the same custome as upon a sack of wooll.

* The two words between crotchets are added to supply a chasm in the MS.—Ed.

Of every cloth of scarlet dyed in grain and carried out,
the sum of 2s.

Of every cloth wherein there is part graine intermixed, ex-
ported, 1s. 6d.

Of every other cloth without graine, 12d.

Of all other things, viz. averduoise, silks, horses, cattle,
and other merchandize exported or imported, three-pence for
the value of every twenty shillings, within twenty days after
their importation and unlading or sale.

Of all merchandizes bought in the kingdom and exported,
three-pence for the value of every twenty shillings *ultra cus-*
mas prædictas regi aut aliis ante datas.

Of every quintall of wax, 1s.

The tenor of the charter itself, because it is the foundation of
the aliens customes, I have inserted, and is as followeth *:

Cart. 31. E. 1. No. 44.

Pro mercatoribus alienigenis de libertatibus eis concessis.

Ex archiepiscopis, &c. Salutem. Circa bonum statum omnium mer-
um subscriptorum regnorum terrarum et provinciarum, viz. Ale-
gie, Francie, Ispanie, Portugalie, Navarre, Lombardie, Tuscie,
incie, Cathalonie, Ducatus nostri Aquitannie, Tholosanne, Tatur-
ie, Flandrie, Brebantie, et omnium aliarum terrarum et locorum
eorum quocunque nomine censeantur, venientium in regnum nos-
trie Anglie et ibidem conuersantium, nos precipuâ curâ sollicitati,
inter sub nostri dominio tranquillitatis et plene securitatis immunitas
mercatoribus futuris temporibus preparetur; ut itaque vota ip-
sorum reddantur ad nostra et regni nostri seruitia promptiora, ipsorum
omnibus favorabiliter annuentes, et pro statu eorundem plenius asse-
culo in formâ que sequitur ordinantes, subscripta dictis mercatori-
bus nobis et hæredibus nostris imperpetuum duximus concedenda, im-
mo, videlicet, quod omnes mercatores dictorum regnorum et terrarum
et securè sub tuitione et protectione nostrâ in dictum regnum nos-
trie Anglie, et ubique infra potestatem nostram alibi, veniant cum
mercatoribus suis quibuscunque de muragio pontagio et paravagio liberi et
liberè; quod infra idem regnum et potestatem nostram in civitatibus
et villis mercatoriis possint mercari duntaxat in grosso, tam
indigenis seu incolis ejusdem regni et potestatis nostræ prædictæ,
et cum alienigenis extraneis vel prenatiss, ita tamen quod merces,
vulgariter mercerie vocantur, ac species minutatim vendi possint,
antea fieri consuevit; et quod omnes prædicti mercatores mercan-
dizas suas, quas ipsos ad prædictum regnum et potestatem nostram ad-
ducere seu infra idem regnum et potestatem nostram emere vel alias
trahere contigerit, possint quod voluerint, tam infra regnum et potesta-

we had the following copy of Carta Mercatoria examined with the record at
the EDITOR.

tem

tem nostram predictam quàm extra, ducere seu portare facere, pro
quam ad terras manifestorum et notiorum hostium regni nostri,
vendo consuetudines quas debebunt (vinis duntaxat exceptis) in
eodem regno seu potestate nostrâ, postquam infra idem regnum
potestatem nostram ducta fuerint, sine voluntate nostrâ et litteris
speciali non liceat eis educere quoquomodo. Item quod predicti
catores, in civitatibus burgis et villis predictis, pro voluntate
hospitari valeant et morari cum bonis suis ad gratum ipsorum
rum fuerint hospitia sive domus. Item, quod quilibet cator
per ipsos mercatores, cum quibuscunque personis undecunque fuerint
super quocunque genere mercandis initus, firmus sit et stabilis,
quod neuter mercatorum ab illo contractu possit discedere vel recessu
postquam denarius Dei inter principales personas contrabentes
fuerit et receptus; et si forsan super contractu huiusmodi con-
tio oriatur, fiat inde probatio aut inquisitio secundum usum et con-
tudines feriarum et villarum ubi dictum contractum fieri consuevit
et iniri. Item promittimus prefatis mercatoribus, pro nobis et
redibus nostris in perpetuum concedentes, quod nullam prisonam
arrestationem seu dilationem occasione prisae de cetero de mercimoniis
mercandis seu aliis bonis suis, per nos vel alium seu alios, pro
quâ necessitate vel casu, contra voluntatem ipsorum mercatorum
quatenus faciemus aut fieri faciemus, nisi statim soluto pretio
quo ipsi mercatores aliis huiusmodi mercimonia vendere possint,
eis alias satisfactis, ita quod reputent se contentos; et quod
mercimonia mercandis seu bona ipsorum per nos vel ministrum
nulla appreciatio aut estimatio imponetur. Item volumus, quod
nes ballivi et ministri feriarum civitatum burgorum et villarum
catoriarum mercatoribus antedictis conquerentibus coram eis ius
justitiam faciant, de die in diem sine dilatione, secundum
mercatoriam, de universis et singulis que per eandem legem
terminari; et si forte inveniatur defectus in aliquo ballivo
ministorum predictorum, unde iidem mercatores vel eorum
dilationis incommoda sustinuerint, vel sustinuerit, licet mer-
versus partem in principali recuperaverit damna sua
minus ballivus vel minister alius versus nos prout delictum exigi-
niatur, et punitionem istam concedimus in favorem mercatorum
predictorum pro eorum justitiâ maturandâ. Item quod in
generibus placitorum (salvo casu criminis pro quo infligenda sit
mortis) ubi mercator implacitatus fuerit vel alium implacitatus
cujuscunque conditionis idem implacitatus extiterit, extraneum
prenatus, in nundinis civitatibus sive burgis, ubi fuerit suffi-
copia mercatorum predictarum terrarum et inquisitio fieri de-
sit medietas inquisitionis de eisdem mercatoribus et medietas altera
aliis probis et legalibus hominibus loci illius ubi placitum aliis
contigerit; et si de mercatoribus dictarum terrarum numerus
inveniatur sufficiens, ponantur in inquisitione illi qui idonei
nientur ibidem, et residui sint de aliis bonis hominibus et de
de locis in quibus placitum illud erit. Item volumus ordinare
statum

949

quæ ad certam custumam facile poni non poterunt, iidem mercatores cefferunt dare nobis et heredibus nostris de quâlibet librâ argenti estimationis seu valoris rerum et mercandisarum huiusmodi, quæ nomine censeantur; tres denarios; de librâ in introitu rerum et mercandisarum ipsorum in regnum et potestatem nostram predictam, viginti dies postquam huiusmodi res mercandise in regnum potestatem nostram adductæ et etiam ibidem exoneratæ seu venditæ fuerint, et liter tres denarios de quâlibet librâ argenti in educatione quarum rerum et mercandisarum huiusmodi emptarum in regno et potestate predictis ultra custumas antiquas nobis aut aliis ante datas; et valore et estimatione rerum et mercandisarum huiusmodi, de quibus denarii de quâlibet librâ argenti sicut predictur sunt solvendi erunt eis per literas, quas de dominis aut sociis suis ostendere poterint si literas non habeant stetur in hac parte ipsorum mercatorum si testes fuerint, vel valedictorum suorum in eorundem mercatorum absque juramentis. Liceat insuper sociis de societate mercatorum predictarum infra regnum et potestatem nostram predictam lanas vendere aliis suis et similiter emere ab eisdem absque custumâ solvendâ; ita tamen quod dictæ lanæ ad tales manus non deveniant, quod custumâ nobis defraudemur. Et preterea est sciendum, quod postquam sepedicti mercatores semel in uno loco infra regnum et potestatem nostram custumam nobis concessam superius pro mercandisiis suis in formâ solverint predictam et suum habeant inde warrantum, erunt liberi et quieti in omnibus aliis locis infra regnum et potestatem nostram predictam de custumâ huiusmodi pro eisdem mercandisiis seu mercimoniis per warrantum, sive huiusmodi mercandise infra regnum et potestatem nostram remaneant, sive exterius deferantur, exceptis vinis quæ in regno et potestate nostra predicta sine voluntate et licentiâ nostra predictam est nullatenus educantur. Volumus autem ac pro nobis et heredibus nostris concedimus, quod nulla exactione, prisca, vel presens aut aliquod aliud onus, super personas mercatorum predictorum, mercandisas seu bona eorundem, aliquatenus imponatur contra formam concessam superius et concessam. Hiis testibus venerabilibus patribus Roberto Cantuar' archiepiscopo totius Angl' Primate, Waltero Cantuar' et Litch' episcopo, Henrico de Lacy comite Lincoln', Humfrido de Hereford comite Hereford et Essex ac Constabular' Angl', Adomaro de Lencia, Gaufredo de Geynville, Hugone le Despencer, Waltero de Campo senescallo hospitii nostri, Roberto de Bures, et aliis. Datum manum nostram apud Wyndesor' primo die Februar'.

And I do not find that there were any customs assessed between the 3. E. 1. and 31. E. 1 for goods imported either by aliens or subjects. * Thus it continued all the time of E. 1. and until the 5. E. 3. and then the lords ordered being authorized by act of parliament with great power

* Rot. Ordin'. 5. E. 2.

annull this *Carta Mercatoria*, viz. nous ordenioms, que tous
 mers de customes et maltouts, levyes puis le coronement le roy
 ard Fitz le roy Henry, soient entyrement oufleees et de tote estincel
 tous jours, nent contrestenant le charter que le dit roy Edward
 el merchants aliens, purceo que el fuit fait countre le grand
 ter et encountre le franchis de la citie de Londres et sans assent
 arnage, &c. sauvent ne quident au roy les coustomes de leyne
 et quires, cest ascavoir de chescun sack de layne demy manke,
 300 peaux lanus demy marke, et de last de quires un marke.
 Presently upon this the collection of the petty customes of mer-
 ch-
 strangers ceased, viz. from 9 Octob. 5. E. 2. and so they
 uncollected and unanswered until the 20th July 16. E.
 and from that time forward the petty customs by merchants.
 gers were answered; and this happened in this manner.
 The king, Edward the second, having gotten the better of
 Earl of Lancaster at his parliament, à die Sancti Baptiste in
 septimanas 15. E. 3. a repeal was made of these ordinances
 E. 2. as prejudicial to the rights of the crown, and that re-
 commanded to be inrolled in the courts of Westminster,
 15. E. 2. Rot. 33.
 and thereupon shortly after, viz. 20 July 16. E. 2. (for he
 in his reign the 7th of July) these petit customes began to
 swered; and the warrant for the collecting of them is en-
 upon the customer's account for the year ending 17. E. 2.
 in the foreign accounts *de tempore E. 2. Rot. 54.* for New-
 and also for Scarborough: And thus it continued answer-
 the time after; and in farther security of it, king E. 3. in
 beginning of his reign, confirmed the *Carta Mercatoria*
 ed by king E. 1. and for the better security both of their
 ges, and of the duties to be answered by them to the crown,
 received at last an affirmation by the statute of the staple,
 E. 3. cap. 1. et 26. and since that time it hath been constant-
 unquestionably allowed.
 hat privileges and exemptions have been granted to the
 merchants, viz. those principally of Collen and Lubeck,
 to the merchants of Almaine, and of the Stilyard, in refe-
 to aliens duties, *vide Cart. 18. E. 1. m. 18. Cart. 28. E.*
 15. and what alteration or advance there have been in
 we shall deliver as they occur in their several series of time.
 the mean time thus much shall suffice, touching the origi-
 and process of the petty customes in the time of E. 1. with the
 ruptions and renewals of them in the times of E. 2. and E. 3.
 and thus much also suffice touching the time of E. 1. Little
 occurs of note concerning it, but only of some impositions
 wines and other petty matters, that vanished, and scarce
 ch as came to account.

* See 1. Rot. Parl. 282.—EDITOR.

C A P. VIII.

*Concerning customes, subsidies, and impositions in the
of Edward the second.*

THE reign of this king was troublesome and tumultuous. He was much under the power of the nobility, especially from the fifth till the fifteenth of his reign; and there are but few memorials of his parliaments extant, whereby we may have some light touching these things. The most considerable business that which is before remembered, viz. the great and petty customs; and little or nothing else, that I can observe, was altered from the first to the fifth year of his reign; both the great and petty custom was accounted for from the fifth to the sixteenth year of his reign; the petty customs of merchants-straungers were suspended by the ordinance of the lords orderers above mentioned; in the fifteenth year of his reign, these ordinances were repealed, and petty customs, and nothing else, that I can observe, was answered from thenceforth during his reign.

C A P. IX.

The proceedings touching subsidies, customes, and impositions during the reign of king Edward the third.

I COME to the time of king Edward the third, who was a valiant and a warlike prince, reigned long, and his time was full of great variety in relation to the customs and other duties, especially relating to the sea.

At the parliament held at York, which was *die Venerabilis festum Michaelis*, 6. E. 3. there was a subsidy of *demy marke* upon a sack of wooll, *demy marke* upon three hundred woollfells, twenty shillings upon every last of hides *ultra antiquam custumam* which was granted to the king for one year, to begin at the next session following. But upon the parliament-roll of that year no such grant appears. In all probability, it was an ordinance by the king and the lords; and indeed so it is recited by the rolls that repeals it. *Claus. 7. E. 3. m. 7. Licet nuper per nos regis et procures regni nostri ordinatum extitisset, quod mercatores indiginæ, &c. teste 30 Junii, 7. E. 3.* But the king, by

ce of this council, repeals that subsidy, and supercedes the
mission for collecting it. The pretence was, that it would
raise the price of woolls: but it is also *ne non aliis de causis*.
ably the people were not satisfied in the legality of the imposi-
tion. But yet afterwards, the arrears were levied and excused
necessity.

After this, to mend the matter, the merchants grant to the
king upon his pressing occasion, ten shillings of every sack of
wooll, ten shillings of every three hundred of woollfells, and
ten shillings of every last of hides exported by denizens or ali-
ens, *ultra antiquas consuetudines* from the 14. Maii 7. E. 3. for
every year. But in the parliament held 8. E. 3. complaint was
made against this imposition as illegall and burthensome. And
upon the king by the advice of his councill, by his writ bear-
date 21 Sept. 8. E. 3. repeals that imposition, and supercedes
collection of it. *Claus. 8. E. 3. m. 18.*

By the stat. 11. E. 3. cap. 1. it is enacted, that none, under
penalty of death, shall export woolls out of the realm, till it be
lawfully provided by the king and his councill.

This gave the king an opportunity to lay impositions, which
could hardly be avoided; viz. he granted dispensations to per-
sons to carry out wooll, paying what sums he pleased. And ac-
cordingly he took by this kind of imposition forty shillings
of every sack of wooll, the like upon three hundred woollfells,
three pounds upon every last of hides, of denizens, and near
as much of aliens, both in the twelfth and thirteenth
of his reign.

12. E. 3. the people complained and grew discontent with
this imposition. And on the other side the king by his letters
to the archbishop of Canterbury to make his excuse to the peo-
ple in respect of his necessity. *Rot. Almaine, 13. E. 3. n. 22.*

At the king's necessities and great occasions increasing, and
illegal supplies coming very hardly from the people, a par-
liament is summoned, viz. 13. E. 3. at Westminster, where the
commons grant the king in aid of his warr the tenth sheafe, fleece
and lamb for the next year, to be paid in two years; but provi-
dence made, *que le maltolt, que ore de novell est levy de lenes, soit
rebatue et soit tenue vieille custume, et qu'ils eient per point
d'enter et enrolement de parlement, que mes ne soit levy tiel custome.*
Parl. 13. E. 3. n. 5. et *ibidem*, n. 13. the petition is again
read against the maltolt of woolls and an imposition upon
woolls *aus assent de la commune ou de graundz.*

At the king's necessities found a way to continue this im-
position; and to give it the better countenance, it is taken upon a
kind

kind of agreement between the king and the merchants for a trade with woolls to Bruxelles, viz. forty shillings at the last port, and forty shillings at Bruxelles, upon every sack of wooll.

At the parliament held the Wednesday after Midlent, anno E. 3. cap. 21. the commons pray the king that there be no more custom be never taken of a sack of wooll fix shillings and eight pence, nor of lead, tinn, leather nor woollfells but the ancient custom. On the other side the king by the lords and commons, that they would grant to him some upon woolls, leather woollfells and other merchandize. The lords and commons thereupon grant the king forty shillings every sack of wooll, forty shillings on every three hundred woollfells, and forty shillings of every last of leather and other merchandizes that pass beyond the sea after that rate, to hold from Easter to Whitsuntide, and from thence for a year. And for the king grants by consent of parliament, that after that time expired he nor his heirs shall not demand, assess, nor take of Englishmen, of a sack of wooll not above half a mark, and of woollfells and leather the old custom; the sack to be twenty stone, and every stone fourteen pound. Observe upon this.

1. This is the first grant that I find of any subsidy of merchandise exported other than woolls woollfells and leather; and was a subsidy measured by the price of leather and woolls in the nature of a poundage.

2. That now the sack was reduced from twenty-eight to twenty-six; and provision was made, that for every sack of silver should be brought to the exchange.

And now a man would think, that the old customes and more should without question have continued without increasing. But it proved otherwise. The king's warrs and occasions increased, and put him upon means to supply wants, notwithstanding other large contributions by the people and thereupon the merchants granted to the king a mark of forty shillings upon every sack of wooll, besides the old custom and though it seems this was done only by the lords and merchants, yet, however it came to pass, it was entered upon parliament-roll 17. E. 3. n. 17. It is formally entered as a grant by the lords and commons, viz. *Et le dits grantz de woolls se sont assentus, que per tout cel temps nostre seigneur prendra de chescun sak de lene que passer 40s. de subsidy sur l'ancien custome.* The time was till Michaelmas and for three years after, during which time certain rates were set upon the woolls of several countries, below

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should not be sold. Whereupon the same parliament N^o the commons pray,

que le maltolt de leyne se teigne a demy marke, come en temps de rogenitours ad este uses, & per lestatute puis en votre temps graun-

Et coment que le merchants eint graunt per eux sans assent des unes un subsidie de 40s. de chescun sack de leyne, outre le droiturall, de demy marke, voillez s'il vous plect aver regard, que tut est en et mischief de vos communes. Par quoi cel mischief, si vous ne voillez soeffrir, mes soit amendez à cest parliament, car c'est re reason, que le commune de lur biens soient per merchants charges. The answer was,

entent de nostre seignior le roy n'est pas de charger les communes per sidie que les merchants lui ont grantes, n'en poet estre entenduz en des communes, no'ement desicome les communes ont mys un certaine sur les leyne permy les countees, le qual prise le roi voet que, et que de dedeins cel prise nulles leyne soient achates, sur forfei- les mesmes les leyne in les maines les merchants que les issint nt.

et yet it rested not here. The king's warrs in France grew reable, and the former imposition of 40s. complained of in 3. ceasing Michaelmas 23. E. 3. there was a new impositi- the consent of the merchants of 40s. per sack set upon s, or rather continued for two years.

parliament was held the Monday after Christmas anno 20. which was after the continuation of that tax; and Rot. 30 E. 3. n. 18 the commons petition against it, viz.

py les commons, que le grand subsidie de 40s. al sack de leyne le, et l'auncient custume pay, come autre foits feust assentu et e.

SPONSIO. Quant a cest point les prelates et autres, veants ffity que le roy avoit d'estre aide, avant son passage per de la, over ses droitures et pur defender son realme d' Angletere, assen- per accord des merchants, que nostre seignour le roy avereit, en sa dite guerre et pur defense de sa dite terre, 40s. de chescun leyne que passer as parts ouster mere pur deux auns prochiens a et sur meisme le grant out divers merchants fait plusors ces a nostre dit seignour le roy en ayd de sa dit guerre, per quoi subsidie ne poet estre repelles sans assent de roy et de ses dits grauntz. e impositions upon woolls being great, the people began to e the manufacture of cloth, which had been long inter- : and by this means the exportation of wooll began to be and the people made cloth and exported it, upon which som was as yet by law set.

Thereupon

Thereupon the king did set an imposition upon cloth, upon denizens fourteen pence for every cloth exported, and upon aliens one-and-twenty pence for every cloth, and some customs upon woollen manufactures, wherein he kept some portion to the rate of the great custom upon woolls. *Vide Custom. 21. E. 3. Rot. Fin. 24. E. 3. m. 19. Jam magna pars regni panificatur, de qua custuma aliqua nobis non est soluta.*

In the parliament of 21. E. 3. *inter bundellam petitionum* commons complain of this imposition.

Item pry la commune, que la ou ses merchants soloient achater et les soloient amesner ouster le mere, et auxi merchants-strainges soloient venter in Angletere pur achater drapes, et per raison de ce ja de novell fait, cest ascavoire de chescun drape 14d. des merchants d'Angletere, et pur gents estrainges pur chescun drape 21d. issint per raison de cel greivous custome nul estrange merchant vient, et commune de la terre des merchants et labourers impovere; de que pry remedy, et que cele custome soit aussee. Item per drapes de stee une nouvelle custuma, sur chescun drape un denier, et de stee 1d. ob. et de chescun lyte 10d. et des strainges 15d. a graunt du peuple labourers, et que cel custome soit aussee.

RESPONSIO. *Il pleist au nostre seignior le roy, as prelates et autres grauntz, que ceste custome estoyse en sa force, car auxi bien reason, qu'il preigne tiel profit des drapes overees de royaume, et mesmes hors du royaume, come de laynes carryes hors selonc l'afferant des drapes overees de sack.*

This petition and answer are not entered upon the parliament roll, because never assented unto by the lords. But the petition is upon the bundle of petitions of that year*.

So here we had these impositions which obtained the name of customs :

Of every woollen cloth,			
Of denizens	-	-	14d.
Of aliens	-	-	21d.
Of every cloth of worsted,			
Of denizens	-	-	1d.
Of aliens	-	-	1d.
Of every bed,			
Of denizens	-	-	10l.
Of aliens	-	-	15d.

* They are accordingly printed amongst the petitions of the commons of London in 2. Rot. Parl. 168. See No. 31.—EDITOR.

but these impositions were intended only of cloth without
; but there was besides this here mentioned a farther im-
position, viz.

- | | | |
|----------------------|---|-----------------------|
| 1. Upon denizens | - | 2s. 4d. |
| Upon aliens | - | 3s. 1d. after 3s. 6d. |
| 2. Upon half graine, | | |
| Denizens | - | 21d. |
| Aliens | - | 2s. 1d. |

though it was at first by the king's commission as an imposi-
tion yet it obtained in perpetuity.

1. First, because it carried a reason of equity, being laid
upon the manufacture of woolls exported, and proportioned
according to the rateable estimate of the custom of a sack of
wooll.

2. Because now it had a countenance by the consent of the
lords in parliament, who judged it reasonable. And accord-
ingly these customs upon oath continued in the times of all
succeeding kings, though with some augmentations, as shall
be shewn in due time.

and it did not only continue, but was extended proportiona-
lly to all new manufactures of woollen.

1st. Parl. 15. R. 2. n. 43. This custome was taken by the
merchants of kerseys exported, and the merchants complain of
it and desire it may be discharged.

The king's answer was, *Pur ce que le roye est inherittez per
sonne apres la mort de ses progenitors de custume de toutz maneres
draps faitz de leine en Angletere, et passants hors de realme,
il leur voet, que tous ceux, que vorront passer ascuns draps,
ils kerseys ou autres, payent ent la custome selonc les ordi-
nances et statuts ent faits.*

By the act of the 11. H. 4. c. 7. this duty is to be paid by
all for cloth made into garments and by them exported pro-
portionably.

1st. Parl. 2. H. 5. pars 1. n. 39. it appears that this rateable
custome was taken of Cornish and Devonshire cloths called streits,
for every four dozen of streits fourteen pence of denizens,
1d. They complain of the excessive proportion, and desire it
1d. be reduced to the rateable proportion of broad cloths, viz.
10d. every dozen of streits white or russet one penny, for every
15d. in coloured two pence. But they prevailed not.

We shall see in this commission following, a great improve-
ment of this imposition.

Anno

Anno 2do. Edwardi 4ti. Rot. 2.

Rex dilecto sibi Thomæ Barton salutem. Sciatis, QUOD mercatores extranei et alienigenæ, cum bonis et mercandisiis in regnum nostrum venientes, pro quibuscunque libertatibus et immunitatibus eis per dominum Edwardum nuper regem Angliæ progenitum nostrum pro se et heredibus suis infra eundem regnum et potestatem nostram imperpetuum obtinendis, teneantur nobis solvere, pro mercandisiis et rebus suis quibuscunque infra dictum regnum et potestatem nostram predictam adducendis et de eodem abducendis, ultra antiquas custumas nobis aut aliis inde debitas, prestationes et custumas subscriptas, scilicet quolibet scarletâ de panno tincto in grano duos solidos; item quolibet panno in quo pars grani fuerit intermixta; item 12d. de quolibet panno sine grano; item de quolibet quintallo cere 12d. item de quolibet ponderis et aliis rebus subtilibus, sicut de pannis tarseum de sericindalis de ceta et de diversis aliis mercibus, de equis etiam et animalibus bladis et aliis rebus, et mercandisiis omnibus, que ad custumam de facili poni non possint, de quolibet librâ argenti estimationis vel valoris rerum et mercandisarum huiusmodi, quocunque venerint, 3d. de librâ in introitu rerum et mercandisarum predictarum in regnum et potestatem nostram predictam infra viginti dies quam huiusmodi res et mercandisæ in regnum et potestatem nostram predictam adductæ et ibidem exoneratæ seu venditæ fuerint, et similiter de quolibet librâ argenti in educatione quarumcunque rerum et mercandisarum huiusmodi emptarum et in regno et potestate nostris predictis ultra custumas predictas nobis aut aliis antedatas; ita semper super estimatione vel valore rerum et mercandisarum huiusmodi quibus 3d. de quolibet librâ argenti, ut permittitur, sunt solvendi datur eis per litteras quos de dominis aut de sociis suis ostenderint; et si litteras non habeant, stetur in hac parte ipsorum mercatorum si presentes fuerint, vel valletorum suorum in eorundem mercatorum absentia, juramenti, quodque sæpe dicti mercatores, postquam in uno loco in regno et potestate nostris predictis custumam nobis concessam pro mercandisiis suis in formâ solverint supradictam, habeant inde warrantum, liberi sint et quieti in omnibus aliis locis in regnum et potestatem nostram de solutione huiusmodi custumæ pro mercandisiis et mercimoniis per idem warrantum, sive huiusmodi mercandisæ in regnum et potestatem predictam remaneant, sive deferantur. Ac in statuto, in parlamento Henrici quarti nuper et non de jure regis Angliæ defuncti anno regni sui undecimo tento, inter cetera contineatur, quod omnes huiusmodi mercatores alii extunc solvent custumam et subsidium pro vestibus factis et aptis de pannis et scarletâ et sanguayne et aliis coloribus de integro

* See xi. Hen. 4. c. 7. in the printed statutes.—EDITOR.

de dimid. grano, ac etiam de pannis in grano tinctis, et omnibus
pannis lanis scissis extra dictum regnum nostrum traducendis jux-
tam et quantitatem eorundem: ASSIGNAVIMUS te ad subsidi-
um predictum in portu villæ Gippivici, et in singulis portubus et locis
portui adjacentibus, tam ad easdem custumas et subsidia pro hujus-
modi vestibus sic aptatis juxta formam statuti predicti quàm ad pre-
stas alias custumas et prestationes in portu et locis predictis, necnon
custumam pannorum de lanis in Angliâ factorum ad partes externas
eandem juxta ordinationem inde nuper factam, viz. quatuordecim
denarios de indigenis, et 21d. de alienigenis, de quolibet panno de
2s. 6d. de indigenis, et 3s. 6d. de alienigenis, de quolibet pan-
no de scarletâ et alio panno de integro grano; et medietatem ejus
de quolibet alio panno de dimidio grano, in quo pars grani su-
permixta; ac etiam ratam earundem custumarum de quolibet alio
panno ultra vel infra assisam, prout major fuerit vel minor juxta porti-
onem inde contingentem, necnon 1d. de indigenis, et 1d. ob. de alienigenis,
de uno panno de integro worsted 5d. de indigenis, et 7d. ob. de ali-
enigenis; et de uno panno et uno lecto simplici de worsted 9d. de indigenis,
et 12d. ob. de alienigenis, pro uno lecto duplicato; in portu et locis pre-
dictis quâmdiu nobis placuerit, in propriâ personâ tuâ, et non per sub-
alternum, levand' et colligend' et ad opus nostrum recipiend' Et ad sigil-
lata vestrum quod dicitur cocquet in portu predicto custodiend' nobis re-
solvend' ad scaccarium nostrum; et ideo tibi precipimus, quod circa
ista diligenter intendas, et ea facias et exequaris in formâ pre-
dictâ in cuius rei, &c. Teste rege apud Westm' 28o. die Aprilis
regni nostri secundo.

Simil' assignatio fact' eidem Thomæ Barton ubi mercatores Hanse
mon' dat' die et anno supradictis, Rot. 3tio.

Simil' assignatio fact' Johanni Talbott 10 die Aprilis anno pri-
m' Edwardi quarti, Rot. 3tio et 4to.

When we come down to queen Mary's time, we shall see,
that this was improved yet farther.

Thus this custom upon cloth was answered down to the
time of queen Mary. Vide Cooke *Magna Carta*, cap. 30. p. 60.
The legality of this imposition upon cloth. Now how this
should be answered by aliens, grew to be a great question; for
they were charged by the *Carta Mercatoria* for three-pence per
piece, and for twelve-pence for every cloth without grain.

These things were therefore resolved:

1. That the three-pence *per libram* chargeable by *Carta
Mercatoria* did not extend to these goods exported or imported
by them, which were charged by that charter with another
rate as wines and cloths.

2. That for pieces of cloths, that were not cloths nor half
pieces, merchants aliens should not be charged with the ratea-
ble

ble proportion of twelve-pence, or one-and-twenty-pence a cloth, but for that they should pay only their poundage three-pence *per libram*, in respect of a clause in the charter the merchants aliens that favoured that construction, and by reason of usage.

3. That although there were formerly by *Carta Mercatoria* an imposition of twelve-pence upon every cloth *sine grano*, now here was one-and-twenty-pence imposed upon such cloth, the Hanse merchants should not be charged with less but paying there one-and-twenty-pence, which was the greater proportion, they should be discharged of the twelve-pence. All this appears by *Claus. 41. E. 3. m. 17. pro mercatoribus transiens, et Communia in scaccario P. 35. E. 3. Rot. Lond. pro Johanne de la Panetry et Willielmo Clompton collectoribus parvæ custumæ London'.*

4. But for other merchants aliens, they did not only pay the duty by *Carta Mercatoria*, but also the imposition of one-and-twenty-pence, &c. upon cloths.

This custome of cloth was conceived so much the less with that of woolls, which was settled by the third of Edward the first, and so intirely due in proportion by virtue of the grant, that it assumed the name, viz. the cocquet, and paid by that warrant. And whereas the small customes themselves due by *Carta Mercatoria*, if concealed, did not induce a forfeiture of the goods themselves, because there was no parliament that gave that forfeiture in that case; yet for the uncustomed the very goods themselves were forfeited, as in case of woolls: because this custom was conceived by law upon the same account as the custom of woolls. *munia in scaccario, M. 6. H. 4. Rot. 20.*

But now to return where I left off,—we have seen the several impositions, and their remissions and continuations, until the 3. E. 3. and by the way we have met with this imposition upon cloth.

We have seen that the merchant's charge of forty shillings upon every sack of wooll was rivetted upon the people from Michaelmas the 20. E. 3. for two years, which ended Michaelmas the 22. E. 3.

But during the continuance thereof, there was a further charge imposed for convoy of merchants, viz. upon every sack of wooll two shillings, upon every tun of wine two shillings, and upon every twenty shillings of goods imported six-pence. The commons complain thereof *Rot. Parl. 21. E. 3. n. 11.* The petition that they could obtain was, that only two shillings per sack should be taken for that purpose, till Easter next. *Vide ibidem.*

They again, in the same parliament petition for the remission of the former imposition upon woolls, viz. forty shillings

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sack, and that woolls may pass at the ancient custome, *Rot.* 21. E. 3. n. 29. but they could not get it off.

Another parliament is summoned, and held the morrow after Hilent, 22. E. 3. The commons were yet under the imposition of woolls until Michaelmas following; and *Rot. Parl.* 22. E. 3. they pray, *que le passage des leynes et autres mercandises soient faits sans faire apprests outer la custome, &c.* The answer is, *le passage overt, que chescun passe franchement savant au roy que lui est due.* He still kept the former maltot till the time of expiration.

After the expiration of that imposition, which ended at Michaelmas, 22. E. 3. the merchants are again drawn to yield to a new imposition of forty shillings for every sack of wooll; which imposition continuing, a parliament is summoned and held in octaves of the Purification, 25. E. 3. And in that parliament. *Rot. Parl.* 25. E. 3. n. 22. the commons grant a subsidy of forty shillings upon every sack of wooll, and upon every last leather, to continue for two years from Michaelmas next: but they petition, that the imposition of the merchants might be discharged. The king accepts their grant, but continues the former imposition till the new began, excusing the same by his great necessities and occasions.

A new parliament summoned and held *die Lunæ prox. post festum Sancti Mathei*, 27. E. 3. The former subsidy of woolls, woollfells and leather is continued from that Michaelmas for six years.

In that parliament the ordinances for the staple were settled, whereby * *cap.* 1. the old custom of woolls, woollfells and leather declared, and a new subsidy of aliens in perpetuity of pence upon every sow of lead settled.

The subsidy of alnage was settled in the precedent parliament, that of provisors, † *cap.* 4. whereof in due time.

A parliament is summoned and held *Craftino Martini*, 29. E. 3. The former subsidy of woolls, woollfells and leather is continued for six years. *Rot. Parl.* 29. E. 3. n. 35.

A parliament is summoned and held 15 Michaelis, 26. E. 3. a subsidy is granted to the king of 20s. upon every sack of wool, 20s. upon every 300 woollfells, and 40s. of every last leather, over the ancient custome, to hold for three years from Michaelmas last. *Rot. Parl.* 36. E. 3. n. 35. But *ibidem*,

there is this additional provision by act of parliament, viz. *apres le dit terme riens ne soit prise ne demanda, forsque P. ent custome de demy marke, ne que cest grant ore fait, ne que*

* 27. E. 3. R. 2.—EDITOR.

† 27. E. 3. R. 1.—EDITOR.

ad est fait devant ces beures, ne soit trete en exemple ne charge common en temps avener: et que merchants denizens puissent paver leur leynes si avant come les forrens sans estre restrainez que nul subsidie, ne autre charge, soit mise, ne grant, sur les leynes per les merchants, ne per nul autre desore en avaunt sans assentement du parlement.

At the parliament held 8^{vis.} Hill, 38. E. 3. viz. Rot. Parl. the commons grant to the king a subsidy of 40s. of every sack of wooll, 40s. of every three hundred woollfells, and four pence of every last of leather, exported, over and above the ancient custome, to hold from the feast of Purification untill Michaelmas following, and from thence for three years.

And *ibidem*, n. 24. 25. the staple removed into England, all new fees and impositions for the staple repealed, and likewise 40d. per sack taken at the staple at Calais, and all other unreasonable impositions, repealed. And *ibidem*, n. 26. the forfeiture of ships for goods uncustomed without privy of the owner removed.

At the parliament summoned and held the first of May, E. 3. viz. Rot. Parl. 42. E. 3. n. 9. a new subsidy is granted for woolls and leather exported, from Michaelmas following for three years; viz. of every sack of wooll 36s. 8d. of every two hundred and forty woollfells 36s. 8d. of every last of leather four pence over and besides the antient custom of half a marke for every sack of wooll and two hundred and forty woollfells, and a penny for every last of leather.

And hereby it appears, that since the last parliament the portion of 300 woollfells answering a sack of wooll was reduced to 240 woollfells, and an equal custome and subsidy charged on them with a sack of wooll; and accordingly that proposition was held always after. Possibly, upon an exacter estimate than formerly taken, they found, that 240 woollfells did counterbalance a sack; and therefore the custom of a sack was charged upon woollfells afterwards, and not upon 300, as was done till the 38. E. 3. as appears by comparing Rot. Parl. 38. E. 3. with 42. E. 3. n. 10.

Another parliament is held 8^{vis.} Trin. 43. E. 3. and where yet there was above a year to come of the former subsidy, the former subsidy is enlarged in time and value; viz. 43s. of every sack of wooll, as much of every two hundred and forty woollfells, and 4l. of every last of hides, *oultre l'ancien custome de demy mark de chescun sack de wooll de denizens, 10s. d'au demy mark de chescun 240 woollfells de denizens, et 10s. d'au demy mark de chescun last de quires de denizens, et 20s. d'alienigenes* to hold three years from Michaelmas next.

In the parliament 45. E. 3. there was no new subsidy of wooll or leather granted, for the former had continuance. But

n. 42.—*priont les communs, que null imposition ou charge soit sur les leynes pealx lanutes ou quires, ouster le custome et die grants au roy, nul part sans assent de parlement.*

RESPONSIO. *Le roy le voet; et si nul soit mise puy le flia- soit repelle.*

the parliament held *Craftino Animarum*, 46. E. 3. viz.

Parl. n. 10. there is granted a new subsidie of woolls and ner exported for two years from Michaelmas next; viz. of zens 43s. 4d. of every sack of wooll, 43s. 4d. of every two dred and forty woollfells, and four pound of every last of er, over the ancient custome; and of aliens, of every sack of ll 10s. of every two hundred and forty woollfeels four marks, of every last of hides eight marks, besides a 15^{me}. granted.

ut besides this, after the close of the parliament, and when knights of the counties were dismissed, the burgessees and ens were called before the prince and some of the bishops rds, and there ventured to grant for one year a kind of dy of tunnage and poundage; viz. two shillings upon every of wine imported, and sixpence of every twenty shillings of handize imported or exported*. This was taken formerly e like composition with the merchants. But it was the time, that I can find, that it came so near to a parlia- ary consent, though it were but a lame busines.

new parliament is held *Craftino Edmundi Regis*, 47. E. 3. hich parliament, n. 12. a fifteenth was granted for two , and a subsidy of tonnage and poundage for two years; d. *per libram* of all merchandizes imported and exported, woolls woollfells leather and wines; and two shillings per of wines, viz. the first year absolutely, the second year condition if the war continued; and also they granted the subsidy of woolls.

though the like tunnage and poundage was taken by way of alation with the merchants almost ever since the 21. E. 3. as rs by the complaints thereof in parliament of 21. and 25. E. 3. fter the end of the last parliament by capitulation with the es; yet this was the first time it was settled by parliament. eed by the statute of 14. E. 3. c. 21. abovementioned, hat like a poundage was granted; and by the *Carta teria* a poundage, viz. of 3d. *per libram* and two gs per ton, was granted by aliens. But this was the gular settled subsidy of tunnage and poundage, charging ns as well as aliens, as I observe.

the next parliament is held, as I observe, *die Lunæ post Sancti Georgii*, 50. E. 3. At this parliament, *Rot.*

a singlar grant by the citizens and burgessees without the knights of the the printed rolls of parliament, v. 2. p. 310. n. 15.—EDITOR.

Parl.

Parl. n. 9. the great subsidy of woolls woollfells and leather granted 46. *E. 3. n. 10.* continued from Michaelmas next for the years; but no new grant of the subsidy of tunnage and portage, and the commons excuse it by reason of their poverty.

From the 27th year of this king until some time before 50th of his reign, merchants were not much troubled with impositions by bare imposition, though there were some paid capitulation, especially upon staple commodities; partly because there were strict provisions from time to time made against them; but principally because parliaments all along gave the king liberrall supplies for his warrs. I do not remember any thing in that intervall, but only the tunnage of wines taken the convoy of merchants, taken purely by imposition.

But the king began now to grow old; and there were no instruments about the 49th year of this king's reign, that the king upon new impositions, viz. for every sack of wheat transported to any place but Calais 11s. 4d. upon the exchange of every twenty shillings, &c. for which Richard Lyons and lord Latimer, the instruments thereof, were punished in parliament, viz. *Rot. Parl. 50. E. 3. n. 17. 24.*

And in that parliament petitions were against new impositions both such as were sett by the king and by officers; viz. chalking, mesonage, God's-penny, cocquett, tronage, &c. *Parl. 50. E. 3. n. 163.* and that they that were instruments to sett new impositions without act of parliament might be put to death; but this was too severe, and prevailed not. *Ibidem.*

At the parliament held the 15^{me}. *Hill. 51. E. 3.* I find no any subsidy granted upon merchandize; for the former continuing.

In this parliament, *n. 25.* the houses among other things petition, *que en temps avener vos prelates, countes, barons, commons, citicens et burgeses de votre realme, ne soient chargees, molestes, ne greves, de common ayde faire ou sustener, s'il ne soit per common assent des prelates, countes, barons, et autres gentz de common du dit realme, ceo en plein parlement; ne nul imposition mise sur les laines peaux lautes, quires, si non l'auntient custome, cest assent de sack de leyne demy marke, de troys cent peaux lautes par marke, de last de quire un marke de custome, tant seulement selonc le statute fait in l'an votre raigne 14^{me}. devant ce subsidie a vous grante tanquee a certaine temps limitt a dire par le parlement, et rient levez a ore.* As to this part of the petition the answer is, quant a ceo que charge ne fuisse mis sur le peuple sans common assent, le roy n'est my en volente de ce faire sans graund necessity, et pur le de defence du royaume, et la on il le purra faire per reason; et quant a ceo que

ions ne soient mises sur les leynes sans assent de prelates,
et, countes, barons, et autres gentz de la commune de son
royne, il y ad estatut ent fait, quele roy voet qu'ilestoyse en sa source.
but this was never drawn up into an act; and therefore the
price of taking of a demy marke upon 240 woollfells conti-
nued, according as it had been practised for ten years before,
withstanding the statute 14. E. 3.

and thus much shall serve touching the customs of goods im-
ported and exported.

The things remarkable in the long and glorious reign of king
Edward the third in reference to these port duties are principally
these:

1.) He settled the *Carta Mercatoria*, whereby the petty
traders were granted; and this he did, not only by his charter
confirmation, but also procured it to be settled by act of par-
liament, 27. E. 3.

2.) He settled the staple of woolls and other staple commo-
dities by act of parliament, viz. 27. E. 3. st. 2.

3.) About the 39th year of his reign he reduced the custom of
any marke for 300 woollfells to be paid upon 240 woollfells.

4.) He settled by parliament in perpetuity the subsidy of
wooll, viz. 27. E. 3.

5.) In his time the first subsidy of tunnage and poundage
was granted.

6.) He established a perpetual custom of 3d. upon every
cwt. of lead.

7.) He did first sett up the custom of cloth exported, viz.
upon every cloth of denizens, and one-and-twenty pence
upon every cloth of aliens; and this was settled upon this
condition, viz. that upon so much wooll as would make such a
cloth had it been exported by denizens undraped, it would have
yielded fourteen pence for custome, and if exported by aliens
it would have yielded one-and-twenty pence, viz. a
part more.—Thus it stood upon such an equality of reason,
though it were originally sett by way of imposition, yet it
was always continued ever since, but with such advances, as
were shewn; for though about a fourth or thereabout of a
sack of wooll made a cloth, yet fourteen-pence, which was near
the fourth part of the custome of a sack of wooll, was the duty
paid upon it. And therefore it seems, that sir Edward
was in the comment upon the 36th chapter of *Magna Carta*
somewhat too hard against the legality of this duty upon
clothes, for that the duty upon clothes was never imposed by an
act of parliament, but by the king and his counsell, as
has been shewn, as within the equity of the custome of woolls.
For that reason, that he gives, viz. that the alnage was given

to the king by the statute 27. E. 3. in lieu of his loss by draping and exporting of cloth, is most certainly misstated. For—1. That is a duty sett by parliament in relation to cloth not exported, but exposed to sale in the kingdom.—2. It is plainly *de facto* the truth was, that this imposition of fourpence and one-and-twenty pence of clothes exported was for compensation of that loss, above five years before the setting of the subsidy of alnage; and the very commission, that setteth expresseth the reason, *qui magna pars lanæ pannificatur*. So the great custome of wooll was not answered for the cloth so exported till this provision made of charging the cloth *pro* which as I said was not by an act of parliament, as is supposed by the book and Dy. 165. but by an act of the king and council, as hath been shewn. It was indeed complained of parliament, and prayed to be repealed, and denied by the king and the lords, but not enacted in parliament that I could ever find.

And hence it was, that in all the grants of the subsidy of tunnage and poundage from Edward the fourth's time downwards, clothes, as well as wooll woollfells and leather, was excepted out of the poundage. And the reason was, because it answered the custom of 14d. and 21d. And though in the time of tunnage and poundage precedent to the time of E. 4. there be no exception of woollen clothes out of the subsidy of poundage, but only an exception of woolls woollfells and leather in all probability they were discharged of poundage by the privy seal, as well as the Hans merchants aliens were discharged of paying their 12d. per cloth of these clothes after the time was sett upon them, as appears by the record above cited P. 35. E. 3. I will sett in the tenor of the writt there entered.

† *Edwardus Dei gratiâ, &c. Thesaurario et honorabilibus consiliariis suis salutem. Cum nuper ad prosecutionem diversarum querelarum de partibus Almanniæ ipsos nobis suggerentium, ipsi quolibet panno de lanâ in partibus transmarinis facto et portato intra regnum nostrum adducendo, custumas subscriptas, formam cartæ eisdem mercatoribus per dominum Edwardum regem Angliæ avum nostrum concessæ, et per nos confirmari solvere consuevisse, viz. de quolibet panno in grano duos solidos de quolibet panno mixto cum grano decem et octo denarios de quolibet panno sine grano 12d. et post modum pro eo lanæ infra regnum nostrum crescentes, et de quibus, si idem regnum nostrum ad partes externas traductæ fu-*

* Ante p. 170.—EDITOR.

† The copy of the following writ as in lord Hale's MS. I found to be in the original words. But through the favour of Mr. Chapman the copy here given is taken from the record in the office of the Treasurer's Remembrancer at the Exchequer, namely, from the *Commun. Secrecaria* of 53. E. 3.—EDITOR.

ma et subsidium nobis solvi debuissent, in non modicâ quantitate
rum infra idem regnum operatæ et panni bujusmodi ad partes
as educi fuerunt; per nos et concilium nostrum ordinatum su-
quod de singulis bujusmodi pannis infra regnum nostrum factis
tra idem regnum nostrum educendis 21d. per mercatores extra-
locò custumæ et subsidii prædictorum ad opus nostrum solventur;
ntosque mercatores dictam custumam 21d. pro quolibet panno
idem regnum nostrum facto et per ipsos ad partes externas tra-
do, juxta ordinationem dicti concilii nostri ad opus nostrum
re paratos fuisse, ac collectores custumæ pannorum de lana infra
m nostrum factorum et extra idem regnum educendorum in portu
n ipsos mercatores pro custumâ 12d. de singulis pannis per ip-
d partes externas educendis ultra dictam custumam 21d. dis-
esse, in ipsorum mercatorum damnum non modicum et depres-
manifestam, et nobis supplicantium sibi per nos remedium ad-
ac nos, advertentes non esse justum aut consonum rationi,
præfati mercatores de duplici custumâ pro unâ et eadem re sol-
onerentur, præfatis collectoribus mandavimus, quod, receptâ
dictis mercatoribus pro quolibet bujusmodi panno per ipsos extra
regnum nostrum educendo dictâ custumâ 21d. demandæ, quas
mercatoribus pro dictâ custumâ 12d. pro bujusmodi panno ad
nostrum solvend^o facerent, supersederentur omnino with a
and to the barons to allow it to the collectors upon their ac-
teste 7 Februi. 35. E. 3.

although this privilege seems to be general as to all mer-
of Almaine, yet it was only enjoyed by the Hans mer-
in after time, as will appear hereafter; for other mer-
alien paid both the 12d. and the 21d.

Queen Mary's time the subsidy of wooll granted to her was
d. over and above the old custom; which amounted to
in all to 40s. of denizens. It was then observed, that 14d.
custome of every short cloth did not countervail the custom
subsidy of wooll; for it was then found; that four short broad
s would be made only of a sack of wooll, and four times
ould amount only to 4s. 8d. whereas to ballance the subssi-
d custom of wooll, each cloth should have born ten shil-

It was thereupon thought fit to increase the custom of
to make it bear some nearer proportion to the custome and
of wooll and yet for the encouragement of the manufac-
Wherefore, by decree of the lords of the council annex-
the book of rates, *Rot. Parl. 4. et 5. P. et M. parte 3 dorso*,
ing under seal in the long house at Westminster, there was
on every short cloth of denizens exported 6s. 8d. so that
nt up the duty of four cloths, which would take up a sack
I. N of

of wooll to 26s. 8d. and upon every short cloth of aliens exported ten shillings.

This duty continued to be paid all the time of queen Mary and queen Elizabeth and king James, and ever since, though not without some dispute, as appears 1. Eliz. Dy. 165.

About the middle of king James, when the custom and subsidy of woolls amounted together to forty shillings upon the sack on denizens, as formerly in queen Mary's time, it was then there wanted a mark in the duty upon short cloths to make the duty answer the custom and subsidy of a sack of wooll, viz. 40 shillings; and thereupon that mark was sett upon four cloths, three shillings and four-pence upon every cloth of denizens than was in queen Mary's time; and that mark upon four cloths was called the pretermitted customes, and accordingly it was in king James his time, and not without great distaste.

The subsidies falling by the death of king James, no new subsidies of woolls or tunnage were granted in king Charles his time, but it was taken by way of imposition till about 16th of Charles, and then taken by the powers of the times, and from the time of Charles the pretermitted custom of cloth was omitted, and the custom of cloth answered according to queen Mary's constitution, viz. 6s. 8d. a cloth of denizens, and ten shillings of aliens. But upon the last settlement of the subsidy of tunnage and poundage granted to the king for his life, and by the last rules then enacted, viz. 12. Car. 2. the duty of short cloths of denizens was reduced to 3s. 4d. the cloth, and that of aliens to 6s. 8d. viz. double the denizens; and so it stands settled by act of parliament. And a short cloth is 28 yards in length, weighing sixty-four pounds. If it exceed, it pays *pro rata*, viz. farthings half farthing a pound weight, and abating after that rate in cloths that are shorter. *Vide* Book of Rates, page 10.

And thus we have the long narrative of the customes and subsidies during the long reign of king E. 3. and also the manner of the progress of the customs of cloth; which, though consisting of divers intervals and variations, I thought good to put together.

C A P. X.

State of the subsidies, customs and impositions during the reign of Richard 2.

King Edward the third began his reign the 25th of January 1623. He died the 20th of June, in the 51st year of his reign, and his grand-child Richard the second succeeded

the entry of R. 2. into his reign the customs and subsidies of goods exported and imported thus stood :

1. The great custom of woolls, woollfells, and leather, 27. E. 1. descended to him *jure hereditario*.

2. The petty customes of merchants-strangers settled by the *Mercatoria* descended to him *jure hereditario*.

3. The customes of cloth and worsteds began and settled 27. E. 3. descended unto him also *jure hereditario*.

4. The custome of three-pence on a sow of lead, settled by 27. E. 3. descended unto him also *jure hereditario*, as also the subsidy of alnage settled by 27. E. 3.

Besides all this, the great subsidy of wooll, woollfells, and leather, granted for three years 50. E. 3. had a continuance for two years to come at Michaelmas, after the beginning of his reign.

In the first year therefore of his reign, though there were subsidies and fifteenths granted, there was no subsidy of merchants. But it appears by *Rot. Parl. 2. R. 2. pars 1. n. 13.* that at a parliament of Gloucester was held 15^{me}. *Pasche*) that at a parliament of Gloucester had been granted one mark upon a sack of wooll, and a charge upon other merchandize; and that is there released the old subsidy of woolls and leather is continued for ever from Michaelmas following.

A new parliament summoned and held 20 October 2. R. 2. the great subsidy granted 50. E. 3. ceased at Michaelmas before; and 2. *Parl. 2. R. 2. part. 1. n. 29, 30.* there is granted 1. of every sack of wooll exported, 43s. 4d. of every wooll exported, 43s. 4d. of every 240 woollfells, 41. 6s. of every last of hides exported, to be paid to citizens and strangers, besides the old custom, for three years from Michaelmas next. There is also granted the duties to be paid until Easter following. So they made a short interval between Easter and Michaelmas following, that might not grow to be a constant duty. They also farther

granted 13s. 4d. upon every sack of wooll, 13s. 4d. upon 240 woollfells, and 26s. 8d. upon every last of hides, by the old customes and the subsidies abovementioned, to hold one year from Easter next. They also granted 6d. for every of all merchandizes exported or imported, as well of foreigners as denizens, from the 16th of November till the 15th Michaelmas following.

Nota, hitherto no penalty imposed upon non-payment of subsidies. The remedy for them was only by seizure or distress, not forfeiture of the goods, or by information in the exchequer for the duty in *specie*.

At the parliament held Hill. 3. R. 2. viz. in *Parl. Rot.* the former subsidies are all continued from Michaelmas next one year.

At the parliament held 5 Nov. 4. R. 2. *Rot. Parl.* the subsidy of woolls, woollfells, and leather, continued till Christmas, and thence to the feast of Saint Michaelmas following.

At the parliament held *Crastino Animarum*, 5. R. 2. the subsidy of woolls, woollfells, and leather, continued from the Feast of the Circumcision till Candlemas, and a day or interposition of time discharged of subsidy left purposeless by the continuation of the same the king might claim it as his right.

At the parliament held after in the same year two shillings and sixpence *per libram* granted from Michaelmas next two years, stat. 5. R. 2. c. 4.

At the parliament held 26 *Octobris*, 7. R. 2. viz. in *pars* 1. n. 35. the subsidy of two shillings upon every wine, and 6d. upon the pound granted untill Michaelmas next with expresse provision, that it be paid out to the admirall for guard of the seas and conduct of merchants between Michaelmount and the Tweed. And *vide ibidem*, n. 36. a complaint of the neglect of that guard; and *ibidem*, n. 35. an imposition of 19d. upon a sack of wooll beyond the custom and discharged as to denizens.

The subsidy of woolls was continued till the feast of Saint Baptist, 9. R. 2. although the continuance thereof seems not to be at all expresse upon the rolls of 7. and 8. R. 2. But at the parliament *die Veneris post festum Sancti Lucae*, 9. R. 2. *Parl.* n. 11. provision is made, that it cease *usque festum Petri ad vincula tunc prox' sequens, ad affectum, ne futurum bujusmodi, quod ex liberâ et spontaneâ concessione dominus communitatis procedit, si forte continuaretur absque interdicto de jure vel consuetudine vindicari valeat vel clamari* the subsidy of woolls and woollfells, viz. 42s. 4d.

quam custumam de denizens et 46s. (1d.) de aliens, and of
 ells and woollfells in like proportion, continued from St. Peter
vincula for one year.

the parliament held 1st October, 10. R. 2. viz. n. 18. a
 dy of 3s. of every ton of wine, and 12d. for every twenty
 ings of merchandize exported or imported, except woolls,
 ells, leather and wines, as well of foreigners as subjects,
 ithstanding any exemption to them granted. The subsidy
 of woolls, woollfells and leather is continued from the feast
 . Peter *ad vincula* to the feast of St. Edmond, and thence
 e 1st of January then next, if no parliament be held in the
 time.—This is the first time that the custom of poundage
 raised from six-pence to twelve-pence.

1. *Parl.* 11. R. 2. n. 16. a grant of a subsidy of 43s. 4d. of
 sack of wooll and every 240 woollfells of denizens, and
 46s. 8d. above the ancient custom, from the 23d of May
 the 24th of June, and thence for a year; and the former
 y of tunnage and poundage continued for the same time.

the parliament held Monday *post festum Sancti Hill. anno*
 R. 2. viz. n. 20. there is granted from the first of March
 the first of January, of every sack of wooll and of 240
 fells of denizens 33s. 4d. of aliens 36s. 8d. beyond the an-
 eustom; and of every last of hides five marks of denizens,
 ve marks and a half of aliens, besides the ancient custom;
 hree shillings for every tun of wine imported, and 12d.
 age of all merchandizes imported and exported, except
 , woollfells, leather, and except victualls, clothes and har-
 ough to Berwick, Roxborough, and Geddesworth, for
 urniture; the rates of poundage to be as it cost the mer-
 at the first buying.—*Nota*: no book of rates then, and this
 ft direction, how the goods should be valued.

the parliament held *Craftino Martini*, 14. R. 2. viz. n. 16:
 is granted for three years from the feast of St. Andrew last
 of every sack of wooll and every 240 woollfells 43s. 4d. of
 ns, and 46s. 8d. of aliens, besides the ancient custom;
 f every last of hides six marks 6s. 8d. of denizens, and
 marks of aliens, besides the ancient customes; and three
 gs of every tun of wine imported, and 12d. per pound of
 merchandize exported or imported, as well of denizens as of
 ers, notwithstanding any privilege.

the parliament held *Ostavis Hill*. 16. R. 2. *Rot. Parl.* n. 11.
 me subsidies of wooll, woollfells, leather, tunnage and
 age continued for three years from the feast of St. Andrew

At the parliament held Monday in the feast of St. Vincent 20. R. 2. viz. *Rot. Parl. n.* 18 the subsidy of tunnage and portage continued from the feast of St. Andrew 20. R. 2. for three years, and the subsidy of woolls, woollfells and leather continued from the said feast for five years.

These are all the subsidies of goods imported or exported which I can observe in the reign of this king. As to the customs which he continued them as he found them left by his grandfather without any considerable alterations or impositions. Only when wool grew up in his time, a certain tax for woolls, woollfells and leather exported, called the *devoires* of Bolyes, which was levied upon a sack of wooll, and 16d. upon a last of hides; and this was also transferred upon cloth upon the reason beforementioned, and was paid rateably for all clothes and workeds. This was only by a special provision by act of parliament, *Rot. Parl. R. 2. n.* 42. single kerseys were discharged of that duty; but it became now, being for a long time quietly paid.

And thus much for the time of Richard the second.

C A P. XI.

Concerning the state of the customes, subsidies and impositions upon goods exported and imported in the time of H. 4.

RICHARD the second having reigned two-and-twenty years three months and fifteen days, was deposed, and Henry the fourth usurped the crown before the expiration of the term of the subsidies abovementioned granted the 20. R. 2. 30th Sept.

There was a subsidy of woolls, woollfells and leather granted in his first parliament for three years from Michaelmas last of denizens 50s. of aliens 60, upon a sack of wooll.

But in his second parliament, begun 20 January 2. H. 4. *ibidem*, n. 9. there was granted to him two shillings of every hundred of wine, and eight-pence in the pound of every maner merchandize imported or exported, except corn, flour, and rees, &c. from Easter next for two years, and a penny double custom upon the merchant making default of payment. This was the first penalty that I find annexed to the non-payment of the subsidios of this kind.

His next parliament was held the last of September, 4. H. 4. that parliament, *Rot. Parl. n.* 28. there is granted for three

Michaelmas last, of every sack of wooll and every 240 woollfells 50s. of denizens, 60s. of aliens; of every last of 5l. of denizens, and 5l. 6s. 8d. of strangers.

Nota: it is not said in the grant *ultra antiquas custumas*.

There is likewise granted from the third of April following to Michaelmas next, and from thence for two years, three shillings every tun of wine imported, except the king's prisage, and re-pence for poundage of goods imported, except woolls, woollfells, leather, corn, bear, &c. and that the merchants making default of payment, that they forfeit the moiety of their merchandizes without other damage.

Where the former penalty is altered.

In the parliament 6 October 6. H. 4. viz. n. 9. there is granted among other subsidies, for two years from Michaelmas next, every sack of wooll and every 240 woollfells 43s. 4d. of denizens, and 53s. 4d. of aliens; of every last of hides 5l. of denizens, and 5l. 6s. 8d. of aliens. The same tunnage and poundage as in the former grant, with the same exceptions, but penalty of concealment omitted.

In the parliament held the 22d December 8. H. 4. viz. n. 9. is granted the former subsidy of woolls, woollfells, and leather, from Michaelmas next for one year, and likewise the subsidy of tunnage and poundage for the same term, but penalty upon the merchant making default of payment. And this is a large capitulation between the king and the merchants; they shall guard the seas for that subsidy of tonnage and poundage. And *ibidem*, n. 50. there is mention made of a constant grant of the like subsidy of tonnage and poundage, upon aliens, except the Hans merchants, granted in a parliament held 7. H. 4.

In the same parliament held 20th October 9. H. 4. viz. n. 26. the same subsidy of woolls, woollfells, and leather, and tonnage and poundage, with the exception as before and of bestaile, is granted for two years from Michaelmas next.

In the parliament held the 15^{me} Hill. 11. H. 4. * there is granted for two years from Michaelmas next, the same subsidy of tunnage and poundage, with the same exceptions, and of denizens 43s. 4d. upon a sack of wooll, and 43s. 4d. upon 240 woollfells, and 5l. upon a last of hides exported; and of aliens of a sack of wooll, 50s. of 240 woollfells, and 5l. 6s. 8d. of a last of hides.

In this parliament held *Craftino Animarum*, 13. H. 4. *ibidem*, there is granted for one year from Michaelmas next, of denizens for every sack of wooll, and of every 240 woollfells 4d. of every last of hides 5l. of aliens of every sack of

* 3. Rot. Parl. page 635. n. 45.—EDITOR.

wooll 53s. 4d. of every 240 woollfells 53s. 4d. of every last of 5l. 6s. 8d. And also there is granted, 3s. a tun of all wool exported or imported, and 12d. per pound of all merchandise imported or exported, except as before. *Quere* for the time.

And thus ends the subsidies of H. 4. in whose time I find no complaint of any imposition set on merchandizes; and it concerned him to be just to the people.—In these subsidies of woolls, woollfells, and leather, it is not said *ultra antiquas custumas*.

C A P. XII.

Concerning the customes and subsidies of merchandises in the time of H. 5.

KING Henry the fourth having reigned thirteen years, months and four days, dyed 20 Martii 1412. Henry fifth his son succeeded him, and summoned and held a parliament which began 15 May 1. H. 5. and in *Rot. Parl.* there is granted for four years from Michaelmas next, of wens 43s. 4d. of every sack of wooll and of every 240 woollfells, and 5l. of every last of hides; of aliens 50s. for every sack of wooll and every 240 woollfells, and 5l. 6s. 8d. of every last of hides exported. *Nota*: it is not said *ultra antiquas custumas*. There is likewise granted until Michaelmas next, and for the year next after, 3s. upon every tun of wine imported or exported, except prisage of wine; and 12d. per pound of wool exported or imported, except woolls, woollfells, leather, flour, fish, rees, bestaile, imported, and except ale exported for victualling of Calais, &c. The rate of poundage to be levied as it cost the merchant, and that their oaths and bonds be credited therein. Defaulters in payment to pay double subsidy without forfeiture of goods.

At the same parliament of Hen. 5. the commons, in petition of being discharged from such subsidies and tonnage and poundage for the time to come, further granted a whole tenth and whole fifteenth†.

* It appears by the printed roll of parliament, that the grant of the commons limits a time for the subsidy of wooll, but is silent as to the time of the duty on wine and poundage on merchandize; and thence grows Hale's question. 3. *Rot. Parl.* 638.—EDITOR.

† This paragraph I have partly supplied from the printed roll of parliament, the passage in Lord Hale's manuscript being here imperfect.—EDITOR.

But at the next parliament held *ultimo Aprilis, 2. H. 5. viz. n.* the former subsidy of tonnage and poundage continued from Michaelmas next for three years in the same manner as the last was.

At the parliament held *die Lunæ prox' post festum Omnium Sanctorum anno 3. H. 5. viz. pars 2.* there is granted to the king from Michaelmas next for his life, of denizens 43s. 4d. upon every sack of wooll and every 240 woollfells, and 5l. of every last of hides exported; of aliens 60s. upon every sack of wooll and every 240 woollfells, and 5l. 6s. 4d. of every last of hides exported; likewise the subsidy of tonnage and poundage, with the same exceptions and remedy as before, with a proviso not to be drawn for example.—This is the first time these subsidies were granted for life.

And now for the ensuing time of this king I find no more grants of subsidies upon merchandize; but his supplies were for the future by tenths and fifteenths, as there was occasion. I find no complaint of any impositions in this king's time.

C A P . XIII.

Concerning the customes and subsidies of merchandize in the time of Henry 6.

HENRY the fifth dying 31 August 1422, his son Henry 6. an infant, succeeded him.

His first parliament was held *die Lunæ ante festum Sancti Martini, 1. H. 6.*

At that parliament, viz. *n. 19.* there is granted of all goods imported from the first of September, and so forward for two years after the commencement of the parliament, of denizens 33s. 4d. upon every sack of wooll and every 240 woollfells, to be paid by moiety at the end of six months after the date of the cocquett; of aliens 53s. 4d. of every sack of wooll and of every 240 woollfells; and likewise the subsidy of tonnage and poundage according to the former proportions, but nothing of leather. Provided, that if woolls shipped by English be lost at the sea, the same should be discharged; or, if paid, to ship out as much more free.

At the parliament held 20 October, 2. H. 6. viz. *n. 14.* there is granted the last day of that parliament, (viz. the 28 Feb. and so continued upon the roll) for two years from Saint Martin's day next,

next, the like subsidy of wooll and woollfells of merchants English as before, and of aliens 43s. 4d. of every sack of wooll and 240 woollfells to be shipped within that time, and the like subsidy of tunnage and poundage.

At the parliament held *ultimo Aprilis*, 3. H. 6. viz. n. 17. the subsidy of woolls for merchants English, and also the tunnage and poundage of merchants English, continued from the feast of Saint Martin 1426 for three years, under the like provisions for losses and forfeitures of double custome, as before. Merchants-straungers excused, because they were to be put under hooft within fifty days after their coming, and to sell all their merchandize within forty days after their coming under hooft.

At the present parliament 18 Feb. 4. H. 6. viz. n. 24. there is granted from Saint Martin's day 1429 for two years, of English wooll 33s. 4d. of every sack of wooll and every 240 woollfells, of aliens for the like 43s. 4d. and the subsidy of three shillings per tun and twelve-pence for every twenty shillings of aliens for the two years aforesaid, and of denizens from St. Martin's next for one year, with the like provisions for losses, and an exception of wooll and woollfells and all manner of woollen cloth out of the subsidy of poundage.—And here came first in the exception of woollen cloth out of the subsidy of poundage, because charged as we have shewn, with another custome imposed; and it has always after this exception continued; for though probably it was paid not poundage before, yet this exception is put in to make it clear.

And the parliament in *quindena Michaelis*, 6. H. 6. viz. n. 25. the subsidy of tunnage and poundage of merchants-denizens granted for one year from the feast of Saint Ambrose next.

At the parliament held 22 Sept. 8. H. 6. there is granted from the feast of St. Michael to the next parliament, the subsidy of three shillings of every tun of wine imported, and twelve-pence for every twenty shillings of other merchandize imported or exported by denizens, except woolls or woollfells hides, and wheat.

At the parliament held *die Veneris ante festum Hillarii*, 9. H. 6. viz. n. 14. there is granted until the feast of Saint Martin, from thence for a year, of every tun of wine imported by aliens three shillings, and of every tun of sweet wine imported by aliens three shillings more; and twelve-pence for every twenty shillings of value of goods imported or exported by denizens, and six-pence more of aliens; and from the feast of Saint Martin 1429

year five nobles upon every sack of wooll.—Provision for
goods taken by enemies or perished at sea.

At the parliament held 12 May, 10. H. 6. the same subsidies
woolls, tunnage and poundage continued for one year from the
feast of Saint Martin 1434*.

At the parliament held 8 July, 11. H. 6. viz. n. 21. there is
granted, of all woollen cloth of any denizen exported in any
strick from the feast of the Conception to the feast of Hillary ;
all for woollen cloth of denizens exported, from the feast of
Hillary to the feast of Saint Martin's, twelve-pence of every
twenty shillings value ; of all merchandizes exported or import-
ed by denizens, from the feast of Saint Martin next for two
years, twelve-pence for every twenty shillings, except woolls
woollfells, wine, fresh fish, &c. of every ton of wine exported
imported of every denizen and alien three shillings ; and of
every tun of sweet wine imported by aliens, from the feast of
Saint Martin for three years, three shillings over the rate of
poundage before granted ; and of every sack of wooll of aliens
imported during that time 53s. 4d.—This is the first subsidy
granted of cloth that I find except alnage.

At the parliament held 10 Oct. 14. H. 6. viz. n. 14. there was
granted of five nobles of denizens, seven nobles of aliens, for
every sack of wooll untill the feast of Saint Martin 1437 ; of every
tun of sweet wines 6s. of other wines 3s. imported by merchants-
strangers, from the feast of Saint Martin 1437 for a year ; 12d. for
every 20s. of merchandizes imported by aliens, from the feast
of Saint Martin 1436 for a year.

At the parliament held the 21 Jan. 15. H. 6. viz. n. 29.
there is granted for three years, from the feast of Saint Martin
next, for every sack of wooll or 240 woollfells exported by deni-
zens 33s. by aliens 53s. 4d. three shillings per tun of all wines,
six shillings per tun of aliens importing sweet wines, for
three years from the first of April ; and 12d. for every 20s. of
merchandize, except woolls and woollfells, and except
woollen cloth of denizens.

At the parliament *Cassino Martini*, 18. H. 6. viz. n. 13. the
former subsidies continued for three years longer.

At the parliament *in die Conversionis Pauli*, 20. H. 6. viz. n. 6.
sequentibus, the former subsidies continued for two years ;
woollen cloth of denizens excepted out of the poundage ; and
the value of the merchandize to be rated by the oath of the mer-
chant or his factor's letters.

* Rot. Parl. vol. 1. p. 389.—EDITOR.

At the parliament held 5 Feb. 23. H. 6. viz. n. 16. the former subsidies continued for four years.

At the parliament held 12 Feb. 27. H. 6. viz. n. 9. the was granted for five years 12d. for merchandize imported exported by denizens or aliens, (the Hanse merchants not excepted) except woollen cloth of denizens, &c. and the shillings per tun of wines imported by denizens or aliens charged moreover, and three shillings more per tun for sweet wines imported by aliens, and the Hanse merchants charged as well others. *Et ibidem*, n. 15. a subsidy of thirteen shillings a four-pence of every sack of wooll of Cumberland and Westmoreland exported, and 33s. 4d. of other woolls, for five years from the feast of Saint Martin next: a forfeiture of the woolls shipped uncustomed; and provision for discharge in case of losses at sea.

At the parliament held 6 Martii 31. H. 6. viz. n. 8. the is granted to the king for his life from the third of April 1454.

1. Poundage of denizens strangers and Almaines, viz. 12d. for every 20s. value; but for tynne strangers to pay the shillings, the valuation as it cost at the first buying, the oath and letters of the merchant to conclude; except wooll, woollfells, hides, wine, and except corn, flour, fresh fish and beef imported, and victuals exported for Calais.

2. Tunnage, viz. three shillings a tun of wine imported by alien denizen or Hanse, and three shillings more for wines imported by aliens. Penalty of concealers double customs.

3. Of denizens 43s. 4d. for every sack of wooll or woollfells, and 5l. for a last of hides.

4. Of aliens 5l. of every sack of wooll or 240 woollfells and 5l. 6s. 8d. for a last of hides.

This is the highest subsidy upon aliens for woolls; and Hanse merchants, notwithstanding their privilege, were included.

In *Rot. Parl.* 33. H. 6. n. 71. the commons found themselves pinched with this act, principally in two things, viz.

1. That the subsidy of woolls was too high upon denizens viz. higher by ten shillings than it had been in this kind of time.

2. That there was no exception of English woollen cloth out of the subsidy of poundage, which was a great discount to the manufacture.

Thereu

Thereupon the king discharged the English of ten shillings, of their subsidy of woolls exported to the staple of Calais or naights of Morocco, for five years; and that every merchant wizen be discharged of the poundage of woollen clothes by m exported by the space of five years.

And this brings these duties to the end of this king's reign; in whose reign I find no complaint of any impositions laid here England. But some are complained of, which were laid in France or Aquitaine in his foreign dominions; as namely, *Rot. 1. 8. H. 6. n. 29.* of 12d. *per libram* set by H. 5. for relief of Bordeaux, which is there repealed; *Rot. Par. 15. H. 6. of 4d. lib.* for the relief of Bayon, continued *Rot. Parl. 23. H. 6. 25. &c.* against taxes in Aquitaine upon wines; *28. H. 6. Parl. n. 51.* the like; and *ibidem, n. 54.* some exertions made by searchers and water-bailiffs, which are there remedied by act of parliament.

And thus we have done with the reign of king Henry the sixth. And being beaten by king Edward the fourth, he lost his crown the 4th of Martii 1460, when he had reigned thirty-eight years, six months and three days; and Edward earl of March, the right heir to the crown, took upon him the government. The profits of customes and subsidies in his time, and in the time of some of his successors, will be the business of the next chapter.

C A P. XIV.

Concerning the customes and subsidies of merchandize in the times of E. 4. and R. 3. H. 7. H. 8. and E. 6.

THE parliament held 4 Nov. 1. E. 4. there was no subsidy granted, as I can find; but the business of the parliament was to settle the kingdom upon the late great revolution. And it appears by the rolls of 1. 2. and 3. E. 4. that these subsidies were answered. It may be there might be some grant, though it appears not upon the parliament roll of 1. E. 4.

But in the parliament held 20 April 3. E. 4. a subsidy of tunnage and poundage was granted to the king during his life; viz. three shillings of every tun of wine imported, and three shillings more of every tun of sweet wine imported by merchants, as well those of the Hanse as others.

Twelve-

Twelve-pence for every twenty shillings of all merchandize exported or imported by subjects or aliens, except tynne.

Two shillings for every twenty shillings value of tynne of merchants strangers, and twelve-pence of denizens.

Except out of the subsidy of poundage, woolls, woollfells and leather exported, and except corn, flour and all woollen cloth made hereby English, all fresh fish, bestayl, and wine.

The value to be rated by the merchants oath or their factors letters as they cost at the first buying.

I cannot yet find the act itself; but it is recited in the statute of 12. E. 4. c. 3. whereby provision is made, that, whereas the act of 3. E. 4. the penalty of concealing of customs is on payment of double customs, now the penalty is the forfeiture of the merchandize inward exposed to sale before subsidy paid and of the merchandize outward if shipped the custom not paid collector agreed with.

Yet in all the intervall between the beginning of E. 4. till the grant the duty was received, possibly by way of mandate imposition.

As to the time of R. 3. I do not remember any grant of the subsidy, yet I think it was granted to him for his life 1. R. 3. He raised his revenues upon woolls and woollfells by licences to transport them to other places besides Calais 1. H. 7. 4.

Neither have I seen any grant thereof in the times of H. 7. H. 8. though it be certain there were grants thereof made to the princes in the first years of their reigns. This appears fully at the time of H. 8. by the statute of 6. H. 8. cap. 14. whereby the statute 12. E. 4. is continued in force during the king's life.

As to the time of E. 6. he began his reign 28 January 1501. His first parliament was held 4 November 1. E. 6.

By the statute 1. E. 6. cap. 13. the former subsidy of tonnage with the addition of 12d. upon every tun of Rhenish wine, and the same subsidy of poundage, with an addition of 12d. for tynne and with the same exceptions of woolls, woollen cloth, &c. as before, and also 33s. upon every sack of wooll or 240 woollfells, and 3l. 6s. 8d. upon every last of hides exported by denizens and 3l. 6s. 8d. of every sack of wooll or 240 woollfells, and 13d. 4d. of every last of hides exported by aliens, are granted the king for his life from the first day of his reign. A forfeiture of merchandize, where the custom concealed; but the penalty to take place from the first Martii next. Provision for merchants' losses, and a provision for the Hans merchants of the Stillyard.

And thus much shall serve for the narrative of these king's time.

C A P. XV.

Concerning subsidies, customs and impositions upon merchandize in the times of queen Mary, queen Elizabeth, and king James.

COME to the time of queen Mary. She began her reign 5th July 1553. By the statute of 1. Mary, session 2. cap. 18. which began by prorogation 24 October, the subsidy of woolls, woollfells and leather, with tunnage and poundage, is granted for her life, from the first day of her reign, viz.

Tonnage :

Of every tunn of wine coming into the realm by way of merchandize, three shillings, and so after that rate.

Of every tunn of sweet wines coming in *ut supra* by merchants aliens, as well of Hans as others, the farther sum of three shillings ; and so after that rate over and above the 3s. before granted.

Of every tunn of Rhenish wine imported 12d.

Poundage :

Of every twenty shillings value of merchandize imported or exported by way of merchandize 12d.

Of every twenty shillings value of tynne exported by merchants aliens 12d. more.

Woolls, &c. viz.

Of every sack or 240 woollfells of denizens born 33s. 4d. of aliens though made denizens 3l. 6s. 8d.

Of every last of hides of denizens born 3l. 6s. 8d. of aliens born 3l. 13s. 4d. and so after that rate.

Merchandizes imported after the first of January next and laid on land, or goods to be exported laid on shipboard after that time, subsidy not paid or collector agreed with, all forfeited. Provision for goods perishing at sea after custome paid to reshipe the quantity free from subsidy. Englishmen shipping any goods in carrick or galley to pay aliens customes.

Some things are seasonable to be observed on this act, which be relative to all the subsidies of this nature that follow, and those that go before as to some purposes, viz.

Although the custom of woolls, &c. be not said *ultra custumas quas*, but generally, yet it is so intended, and was so practised for custome and subsidy came to 40s. of denizens, as will appear by the imposition hereafter set upon cloth, which appears

to

to have been rated upon a supposition that both the subsidy and custome of woolls were due.

2. Merchants aliens made denizens rated to the subsidy aliens, which is but pursuant to former laws.

3. The Hanse merchants pay their subsidies as other aliens notwithstanding their privileges; which though in some former acts they are saved, yet here and in some others they are derogated.

4. The commencing of the duty outwards by exportation, and inwards by importation, by way of merchandize.

5. The penalty or remedy: a forfeiture of goods exported and shipped, of goods imported if landed or unshipped to be landed, the custome not paid or collector agreed with.

These and many other observables touching these kinds of duties will be more particularly observed.

6. The estimate of the rate of merchandize not left to the merchants oath or advices, but generally.—And the reason was, because at the time of this subsidy granted, it was in design and prospect to set a public estimate or book of rates of merchandize according to which they were to pay poundage; which was accordingly done, being the first time of the making of a book of rates; according to which rates poundage was paid all the time of queen Mary and queen Elizabeth, and until 2. James, as appears by the recital of the letters under the privy signet of king James 26 November, 2. James, for the setting of a new book of rates. This book of queen Mary was delivered into the exchequer with the great seal and sign manuell, to be the rule of those payments where it still lodgeth. If any merchandizes were omitted out of the book of rates, as many were, they paid poundage *ad valorem* according to the reasonable estimate between the merchant and the customer.

Thus much concerning the subsidies in the time of queen Mary.

As touching the customes both great and small, they stood as they were in the times of former kings. Only as to cloth, as before observed, whereas the custome imposed thereupon by king Edward the third was 14d. upon every short cloth of denizens and 21d. upon aliens; which allowing four such cloths to a sack of wooll arose to 4s. 8d. upon denizens, and 7s. upon aliens by decree of council 4. et 5. P. and M. *Rot. Parl. parte 3 dorset* the custome of a short cloth upon denizens was sett to six shillings eight-pence, and upon aliens to 13s. 4d. viz. double to denizens. Wherein though the sack of wooll, which made four cloths, was rated 33s. 4d. upon denizens, and three pounds upon aliens, by the customes; yet this custome upon cloths did not answer proportion.

portion of the subsidy and custom of the sack; for it came but 6s. 8d. of denizens, whereas the subsidy and custome of a sack was to 40s. and of aliens to 58s. whereas their subsidy of a sack was to four pounds.

and there was a reduction likewise of other cloths, as streits, laces, &c. to the proportionable subsidy of broad cloths.

this though it were complained of as an imposition 1. Eliz. 1565. yet it continued during the times of all her successors, appears by the book of rates set forth in 2. Jac. and the war- for the same 26 Nov. 2. James; and the reason was, because it seemed to be warranted at least by the equity of the old custome of woolls; for cloth exported was yet so much wooll exported, though turned into a manufacture, and therefore it retained the name of custome, and not of imposition.

the queen, also, after a long intermission of impositions by her predecessors, did set an imposition of 40s. a tun upon French wine imported; which in truth was not so much an imposition as a bargain for a dispensation: for in the fifth year of her reign, she issued a proclamation prohibiting the importation of French wine, and immediately after made an order of council that any wine imported paying 40s. per tun by the name of impost. But she did not create a duty, neither indeed could; and therefore in Parl. 1. Eliz. in the king's remembrancer's office there was information against Germane Ciol for not paying that impost for wine imported. He pleads a lycence 1. 2. Mary to import French wines for a certain time, notwithstanding any restraint made or to be made, provided that the customes, subsidies, and other duties due and accustomed to be paid to the king and queen, were duly satisfied. He avers, that he paid for these wines forty shillings for every tun, being all that was due and accustomed to be paid. (*Nota:* the importation was after the impost of forty shillings sett.) It was hereupon demurred, and judgment for the defendant. But possibly this judgment might be on some matter by the by.

she also laid an imposition upon all French commodities; and it continued to be taken for some time in the first year of queen Elizabeth, but then was discontinued.

and thus much shall suffice for the time of queen Mary.

touching the time of queen Elizabeth, who began her reign on the 17, 1558, by the statute of 1. Eliz. cap. 19. in the first year which began 23 January 1. Eliz. the subsidy of tunnage and poundage, woolls, woollfells and leather is granted to queen Elizabeth during her life, from the 16 Nov. last, with the same exceptions, provisions and penalties as in the act of the 1. Eliz.

grant thereof to queen Mary. Whether she continued the custom of cloth in the same manner as queen Mary left, I find in any memorials of impositions in her time: yet some there were. She collected the subsidies according to the book of rates settled by queen Mary.

I come to the time of king James, who began his reign March, 1603.

By the statute of 1. *Jac. cap. 33.* the subsidy of tunnage and poundage, woolls and woollicells was granted to king James during his life, from 18th March last, in the same proportion of sums and with the same exceptions, penalties, &c. as they were granted to queen Elizabeth and queen Mary, with a farther exemption of herrings and sea-fish from custome.

26 November, 2. *Jac.* the king by his letters under his great seal did settle a new book of rates, which was printed with a letter, and continued the custom of cloth as it was sett by queen Mary.

After this in the 5th year of his reign the king to improve his revenues began to sett impositions beyond the subsidy granted. He began with currants.

Bates, a merchant, refusing to pay this imposition, an information was exhibited against him in the exchequer for the contempt. And *Mich. 4. Jac.* judgment was given by the then barons against the king.*

Way now being made by this judgment, the king, by letters patent under his great seal with a book of rates annexed bearing date 28 July, 6. *Jac.* doth not only settle the rates of merchandizes, but also almost upon all merchandizes sett by parliament; as for instance, the subsidy of Gascoigne wine imported by denizens was 3*s.* the impost was 42*s.* and 15*s.* the whole duty 3*l.* &c.

Much contest there was against these impositions and against the judgment in Bates's case in severall parliaments, as may be seen in the collections of Sir Edward Cooke upon the 30th chapter of *Magna Charta*†. But whatever the law was, yet for reason of state to make a ballance between the trades here and beyond seas, and divers other matters, prevailed; and the imposts were taken all the life-time of king James.

* In the new edition of the State Trials there is an account of Bates's case, and the proceedings upon it. See vol. xi. page 29.—EDITOR.

† 2. Inst. 58.—EDITOR.

and besides this, about the middle of king James, although the warrant and book of rates 2. and 6. *fac.* the custom of which was taken as it was in queen Mary's days, and so directed, some inquisitive customers found that that custom so sett in queen Mary's time, viz. 6s. 8d. upon a short cloth of denizens, not countervaille the custome and subsidy of a sack of wooll, each of denizens was 33s. 4d. subsidy and 6s. 8d. custom, in 40s. for one sack would make four clothes, which at 6s. 8d. cloth amounted to 26s. 8d. of denizens. And therefore there was 3s. 4d. added to the custom of four short clothes, viz. to 10s. the cloth, which balanced the subsidy and custom of sack of wooll of denizens. And the like proportion was taken in cloth exported by aliens to ballance their subsidy and custom of wooll, viz. 4l. And these were called pretermitted customes, were sometimes exacted, but complained of in parliament, so intermitted.

12. *fac.* Swinerton, being farmer of the custom of wines, there was some difference between the farmer and merchant touching a reasonable allowance to be made for leakage of wines, because of the nature, especially Spanish, partly by accident and partly by their nature, would waste at sea; and it was not possible without such inconveniency to fill up their vessels, for it may be they were not wines of their own of the kind; neither was it reasonable to pay full tunnage, where possibly the vessel might be half full; and besides, it would be troublesome to gauge every vessel. They came therefore to this agreement, that the merchant should not fill up in the port; but should have an allowance of twelve pound per cent. for leakage out of his customs and impost; and this was settled by order of the council 12. *fac.* and this is as much as I shall speak concerning the time of king James.

King Charles the first succeeding him; there grew differences between him and his houses of parliament in 1. and 3. Car. so that there was no subsidy of tunnage and poundage granted to him. Only he had the great customs of woolls; woollfells and skins, which was insignificant in respect of the inhibition of exportation of those commodities. He had also the petty customs of aliens and that of cloth. But these were not sufficient to support the charge and dignity of his majesty.

He therefore for his great necessity turned what was received from his father by way of subsidy and impost into one great impost; accordingly the same was collected by the king's farmers in the first till the 16. Car. at which time the long parliament 16. Car. began*.

* See 9. Parl. Hist. 310. 317. 339 — EDITOR.

The farmers of these impositions in the parliament of 16. Car. are called to an account for receiving of these impositions without authority of parliament; and they and their partners, to avoid the severity of the house, made a composition in nature of a fine of _____ for their peace, which was accordingly paid.

The subsidy of tunnage and poundage was granted to the king in 16. and 17. Car. for some small time $\frac{1}{2}$; but the difference broke out between the king and his houses of parliament, before they were settled upon him for his life.

Nevertheless the bill was prepared for that purpose, where the right also of the subject against impositions, and a particular enumeration of those duties upon merchandize, which do not right belong to the crown. But this bill passed not the king's consent.

During the time of the late troubles, these were taken sometimes by way of loan or advance, then by ordinances of the houses, then by the temporary edicts of those that *de facto* obtained the power during the king's life, and after his death upon the return of his now majesty in the 12th year of his reign, whereof in the next chapter.

* The proceedings on this composition may be traced by consulting the Journals of the Commons in the places referred to under the head of *Customs* in the Index to the 2d volume; and by them it appears, that a composition of 150,000*l.* was made upon; but it is not quite clear, whether this was a sum for the whole body of the customs, or only a part of them.—EDITOR.

† The act granting this subsidy of tonnage and poundage is not in print. But Clarendon gives part of the preamble, according to which it contained the disavowal of the claim of the crown to tax at the ports. 1. Clarend. Hist. book 264. The king's speech on giving his assent to the act confirms this; his words are, "In this particular bill I hope you will know, that I do freely and frankly give the right which my predecessors have ever challenged unto them, though I do not dispute it; but yet they did never yield it in their times." Rushw. part 3, page 297. 9. Parl. Hist. 384.—Upon a further search I find a short statement of the act in Rushworth. From this it appears, that the act recited it to be the right of the subjects of this realm to have no subsidy, custom, impost or charge upon merchandize exported or imported by denizens or aliens, without consent of parliament. But the act did not stop here; for it made receiving any duty not warranted by grant in parliament highly penal; the act containing a provision, that no person should take or receive any imposition laid on merchandize except by grant in parliament, he should incur the forfeitures provided by the statute of *Præmun.* the 16. R. 2. See Rush. vol. 2. of 2d part 1382. Other statutes have condemned the practice of levying taxes on the subject without grant in parliament in very strong terms. Thus the statute of 34. E. 1. *de tallagio non concedendo* concludes with a declaration, that the archbishops and bishops should for ever read that statute in the cathedrals twice a year, and denounce accursed all infringers of it. But this Charles I. believe was the first instance of a fixed penalty in *terror* against the receivers of an unlawful tax; nor on the Restoration was it deemed necessary to set an example of such extremity; simply declaring what is the constitutional mode of taxation being then thought very adequate to guard against future encroachments.—EDITOR.

C A P. XVI.

*concerning the subsidies and customes as they now stand in the
time of king Charles 2.*

Y the act of parliament 12. Car. 2^{di}. c. 4. the subsidy of
tunnage and poundage, &c. is granted to the king for his
under some difference of rates than formerly, viz.
to tunnage :

Of French wines imported into London and the members
thereof by way of merchandize, by natural-born subjects
4*l*. 10*s*. per tun, by strangers 6*l*. per tun.

Of French wine imported into other ports, by natural-born
subjects 3*l*. per tun, by aliens 4*l*. 10*s*. per tun.

Of sweet wines imported into London, by natural-born
subjects 45*s*. per butt, by aliens 3*l*. per butt.

Of every sweet wine imported into other ports, by natural
born subjects, 30*s*. per butt, by aliens 45*s*. per butt.

Of every awm of Rhenish wine imported by natural-born
subjects 20*s*. by aliens 25*s*.

An additional duty

Of French, Spanish, Portugueze, German, and Madeira
wines, 3*l*. per tun.

Of other wine 4*l*. to be paid in nine months.

subsidy of poundage, viz.

12*d*. of every 20*s*. value of merchandize exported or im-
ported by way of merchandize.

Of English commodities or manufactures exported by aliens
12*d*. more of every 20*s*. except woollen cloth wrought in
England, called old draperies, wines, fish taken by English,
fish, bestiall.

Of every short woollen cloth called broad cloth exported by
natural subjects not exceeding 28 yards, 3*s*. 4*d*. if exceeding
pro ratâ, if shorter *pro ratâ*, and exported by strangers
8*d*.

book of rates settled the forfeiture of goods uncustomed, &c.

provision for goods lost at sea.

goods shipped in carricks or galleys to pay aliens customes.

the goods formerly prohibited licenced to be exported.

age not charged with custom.

The

The book of rates follows, and therein divers rules; among which the first is, that no duty shall be paid for more than once entered and landed. The last is, that no other duties be levied during the continuance of these, but only the duties enacted for prize, butlerage, and the imposition upon coals.

And this is now the great and only rule, by which the duties of merchandizes exported or imported are to be ruled and governed. For all other duties, whether by common law or by parliament or imposition, are now under suspence during the continuance of this grant, by the last rule of the book of rates.

And thus I have gone through the history, or narrative, of the successive progress and various alterations of duties and subsidies, or impositions, as far as I can meet with any evidence concerning them. And now I shall proceed to more close particular discourses touching these duties.

C A P. XVII.

A general scheme of the customs as they stood in the year of E. 4.

IN the former discourses there lies dispersedly and scattered most of what is to be said concerning customs, viz. of the kinds, the times when and manner how they began, their causes and variations, the persons by whom due, and the accidents that excused them, the means of their recovery, and some other particulars of this kind.

But because they lie dispersedly in several places, and mentioning them is rather for the continuation of the history than *ex proposito* to treat of them, I shall resume them in order.

First, I will begin with these that are the customs of importance, and therein of their several natures, when and by whom due, and how recoverable; many of which considerations will be very apposite and useful to the second and third heads, and will be in many things coincident with them, or very explanatory of them.

* It seems proper to add to lord Hale's account of the first grant of tonnage and poundage after the Restoration, that one clause in it contains a recital, that "rates can be imposed upon merchandize imported or exported by subjects, but by common consent in parliament." 12. Cha. 2. c. 4, f. 6.

Secondly, concerning impositions, and the right and power of imposing duties upon merchandizes exported or imported.

Thirdly, concerning the subsidy of tunnage and poundage as stands settled by act of parliament, and the questions that may arise upon various clauses of the same.

I shall be longer in the first of these heads, because much of that will be said therein will be usefull and applicable in many particulars to the last of these. And besides, though at present these former customs are under suspence; yet there is very excellent learning to be found in ancient records concerning them, which is worth the knowledge.

First therefore I shall sett down a scheme of those old customs, partly from the records themselves, partly from the black book of the Admiralty, which hath the scheme of them as they stood at the finishing of that book, which I think was in the time of E. 4. and upon comparing of the customers accounts of that time I find them exactly agreeing.

First therefore touching the custom of woolls, woollfells and leather, commonly called the great custom, settled as hath been shewn by the act of parliament 3. E. 1. and descended to successors *jure hereditario*, viz. *magna custuma*.

1. Of every sack of wooll and of every 240 woollfells exported, by denizens 6s. 8d. by aliens 10s.

2. Of every last of hides containing 20 dickers, and every dicker ten hides, exported, of denizens 13s. 4d. of aliens 20s.

There arose certain other customs incident to woolls, woollfells and hides, and therefore accounted for together with the great customs. These customs were of two kinds, viz.

1. The cocquet, viz. of every merchant, denizen or alien exporting woolls, woollfells or leather 2d.

2. The devoirs of Calais, where ordinarily the staple was, which began the 45. E. 3. and continued constantly after answered, at least till the end of E. 4. viz. of every sack of wooll or 240 woollfells exported by aliens or denizens 8d. of every last of hides exported by aliens or denizens 16d.

and besides these we may reckon among those great customs, *Ob. et*—which continued payable upon every sack of wooll.

3d. *per lib.* upon lead set by the statute of 27. E. 3.

II. The *parva custuma*; and that was upon four sorts of commodities, viz. cloth, wax, wines, and averdupoise, or other of merchandize, which was their poundage.

(1.) The

(1.) The petit custome of cloth, viz. of these several kinds

1. Cloth of scarlet or whole grain exported.

1. By denizens. The imposition of 21. E. 3. set upon them 2s. 4d.

2. By aliens. They paid 2s. by virtue of *Carta Mercatoria* and 3s. 1d. by the imposition upon cloth began the 21. E. 3. in toto 5s. 1d.

3. By the Hanse merchants by the virtue of the *Carta Mercatoria*, at which rate they paid 2s. but in the time of E. 3. they paid 5s. 6d. viz. 2s. by *Carta Mercatoria*, and 3s. 6d. imposition.

2. Cloth half grain.

1. Denizens paid 21d. by the imposition begun upon cloth the 21. E. 3. which though at first it was 14d. it was afterwards raised to 21d. upon denizens, and so held.

2. Aliens paid 4s. 1d. whereof 18d. was the composition rate set by *Carta Mercatoria*; the residue, viz. 2s. 7d. was by impositions afterward.

3. Hanse or Almaine merchants paid only 18d. being the rate set by *Carta Mercatoria*, which they kept by virtue of their charters of privilege, notwithstanding the additional imposition upon cloth.

3. Cloth without grain.

1. Of denizens 14d. by virtue of the imposition set by the 21. E. 3.

2. Of aliens 2s. 9d. viz. 12d. by virtue of *Carta Mercatoria* and 21d. by the imposition of 21. E. 3. set upon the cloth exported by aliens.

3. Of Hanse and Almaine merchants 12d. only by virtue of *Carta Mercatoria*, for they had by virtue of their charters an exemption from the payment of the 21d. paid by other aliens as before.

And note, that for these clothes aliens paid no poundage viz. no 3d. *per libram*; for the *Carta Mercatoria* secured them from that part of these duties, the 3d. per pound was not paid for them.

4. The customes of worsted.

These were imposed by the king and his council 21. E. 3. in compensation of wools, whereby they were made. Though in the first imposition it was for the piece exported by denizens 1d. and by aliens 1d. ob. and for a bed of worsted by denizens 10d. by aliens 15d. yet, the manufacture receiving an alteration, there was in process of time alteration of the custom, viz.

For pieces of worsted,

Denizens 2d.

Of aliens 3d. besides their 3d. per lb. by virtue of *Carta Mercatoria*.

For a single piece of worsted,

Denizens 1d.

Aliens 1d. *ob.* besides their 3d. for poundage.

For bedds of worsted, viz.

For double bedds,

Of denizens 10d.

Of aliens 13d. *ob.* besides their poundage, viz. 3d.

For half doubles,

Of denizens 7d.

Of aliens 10d. *ob.* besides their poundage of 3d.

For single bedds,

Of denizens 5d.

Of aliens 7d. *ob.* besides their poundage of 3d.

But the Hanse merchants paid only 2d. for pieces or for bedds of worsted, besides their poundage of 3d.

But note, that during the time of king Edward the 4th by a special charter the Spanish merchants paid only English customes.

The second general of the petty customes was wax, viz. every quintal of wax there was paid,

By denizens 2s. which grew by imposition; and this they paid besides their poundage of 12d. *per lib.* when that subsidy was granted.

By aliens, as well Hanse as others, 12d. for every quintal.

The customes of wines, viz. 2s. per tun in lieu of prisage *Carta Mercatoria*, paid by all aliens, as well Hanse as others.

Their customes of averdupoise, viz. 3d. for the value of every 20s. paid by the merchants aliens, as well Hanse as others.

These are those which are collected as the petty customes.

And 1. it is to be observed, that when any subsidy of tunnage was granted generally of aliens and denizens, unless there were special provision by the act of subsidies to the contrary, aliens did not only answer the subsidy of poundage, but also their petty custom of poundage, viz. 3d. *per lib.* as appears by all the customers accounts, especially *tempore E. 4.*

2. It is also to be observed, that upon those clothes, whereupon the petty custom was granted by *Carta Mercatoria*, as scarletts, half grain, and cloth of assise without grain, the aliens paid not only the duty by *Carta Mercatoria*, but also that additional custom or imposition, which was after set upon cloth to ballance the custom of wooll, unless the Hanse merchants, who most ordinarily paid only the custome sett by *Carta Mercatoria*.

3. But

3. But of those clothes which were not expressly charged with custome as cloth by *Carta Mercatoria*, but were rated a custom proportionable to the woolls whereby they were made, which began as hath been shewn 21. E. 1. and was afterwards, as worsteds; aliens did not only pay their imposition set upon those clothes, but also their poundage of 3d. for the value of every twenty shillings; and this was paid as well by the Hanse merchants as others. And the reason was, because before this imposition upon it as a manufacture of wooll was charged with 3d. per pound as averdupois. Though sometimes they had intrusions, yet it revived again. This shall be shewn more at large in the next chapter.

C A P. XVIII.

Concerning aliens and their customes; and first concerning the Hanse merchants, and their privileges in relation to the customes.

IN the precedent chapters we see frequently a difference between the customes of aliens and denizens; and among the aliens we see a difference between the customes of themselves. The Hanse or Almaine merchants paid a greater custome, and sometimes a smaller subsidie than other aliens, although sometimes in their subsidies they were reduced to the same measure as it is this day.

I shall therefore, in the first place, sett down the narrative concerning the Hanse merchants, and the progress of their privileges in relation to the customes; wherein, though there may be some things that will be applicable to merchants alien in general, yet the principal scope will be to derive the privileges of the Hanse merchants: and when that is done, I shall descend to the consideration of aliens in their latitude, and who they are.

Narrative concerning the Hanse merchants.

Although the merchants of Almaine, sometimes called *mercatores Almaniae*, sometimes Hanse merchants, sometimes *Englins*, had many special privileges granted them in the time of Hen. 3. and perchance also before, which possibly were the foundation of the accessions of privileges which they had in the times of succeeding kings; yet I shall not go so high in deducing of their privileges, because, as the great settlement of the customes began in the time of E. 1. so the privileges and exemptions of the Hanse merchants in relation to those customes principally began in the times that succeeded that general settlement of the customes in the time of E. 1.

in the first settlement of the great customes anno 3. E. 1. it
seems to be without any distinction between denizens and
strangers: they paid alike; but the discrimination grew at first by
the *Corta Mercatoria* 3. E. 1.

By that charter the king granted the liberties therein com-
mended to all merchants strangers of all countries, with which
commerce was then used, viz. *Almania, Franciæ, Hispaniæ,*
Ungariæ, Navarra, Lombardia, Tuscia, Provincia, Catba-
ria, Ducatus Aquittania, Tholosana, Tartarina, Flandria,
et aliarum terrarum et locorum extraneorum venientibus in
Angliam. And all these foreign merchants granted to the
king and his successors these aliens customes comprized in that
charter. And accordingly the customs hereby granted were
continued till the resumption in 5. E. 2. which resumption thereof
afterwards repealed 15. E. 2. as hath been shewn. So that
it was in nature of a great contract between the king and the
merchants, and carried in it a reciprocal consideration, viz.
of liberties and privileges to the alien merchants, and advance of
customes and grant of new to the crown by them.

In the latter end of that charter there is this clause: *Volumus*
etiam, ac pro nobis hæredibus et successoribus nostris concedimus,
nullam exactio, prisam, vel prestatio, aut aliquod aliud onus,
super personis mercatorum prædictorum, mercandisas seu bona
eorum, aliquatenus imponatur contra formam expressam super-
ius concessam.

This should seem to be a general concession to all foreign mer-
chants, exempting them from all new customes or impositions
after to be imposed. But it prevailed not in that latitude,
as will be shewn.

And besides this general charter granted to merchants strange-
rs, the Hanse merchants, which were but a branch of the mer-
chants of Almaine, had more particular liberties granted to
them; for 1. H. 3. there was granted to them a house in London
called *Guildhalda Teutonicorum*, which was afterwards confirm-
ed 1. E. 1.

These Hanse merchants were those merchants of those great
cities in Germany lying upon or near the Baltic sea, and are at
this day called the Hanse towns, consisting of four principal head
towns, viz: Lubeck, Cologne, Brunwicke, and Dantzicke,
and their under quarter towns.

There was a pretended defect espied in the charter of E. 1. to
the Hanse merchants; because the charter was not granted *pro*
hæredibus. And thereupon the 7th December 11. E. 2.

The place thus granted by Henry the third to the Hanse merchants is known by
the name of the Steleyard or Stelehouse. See Stowe's London, Strype's ed. in
book 2. page 202.—EDITOR.

there

there was a new charter granted to the *Almaine* merchants in general, but *illis scilicet, qui habent domum in civitate Londoniæ quæ Guylldhalda Teutonicorum vulgariter nuncupatur*, which was granted to the Hanse merchants. By this charter the king confirms the liberties formerly granted as well by *Carta Mercatoria*, as by particular charters; and further grants in exprefs words, *quod nos vel hæredes nostri, super ipsos aut eorum bona vel mercimonia, in curiam nostram novam indebitam non ponemus, salvo nobis et hæredibus nostris antiquis præsentiis nostris; quodque ipsi per totum regnum nostrum bonis et mercimoniis suis de pontagio pavagio et muragio in perpetuum sint quieti, ita tamen quod aliquem, qui de guilda ipsorum antepredicta non existet, nec ejus bona seu mercimonia, de quibus sua non advocent ullo modo.*

This charter was confirmed by king E. 3. 14. Martii 1. by R. 2. 6 Nov. 1. R. 2. and after all by king E. 4. by conference of parliament 13. E. 4. *. as shall be shewn.

By these charters and confirmations the Hanse merchants obtained not only personal privileges, as they were merchants, but also obtained the effect of an incorporation, and also held the Still as the house of their incorporation in succession.

By virtue of these charters thus exprefs, especially the E. 2. they enjoyed certain exemptions in relation to customs which were not allowed to other merchants aliens, though some things their charge was alike, as before shewn in the precedent chapter.

For instance,—It hath been before shewn, that besides the customs of cloth sett by *Carta Mercatoria*, there began in 21. E. 3. an imposition or custome to be sett upon cloth worsteds in proportion to the custome of a sack of wooll; and a new custome or imposition in process of time was introduced, which appears by the scheme of the customs in the precedent chapter. And all aliens except the Hanse did not only pay their customs contained in *Carta Mercatoria*, but also the new imposed customs laid upon cloths 21. E. 1. and in the succeeding times. But the Hanse merchants had a greater liberty by reason of that clause of exemption in the charter of E. 2.—For some times before they paid the 21d. imposed upon cloth 21. E. 3. But when they paid that, they were exempted from payment of the 12d. 18s. and 2s. set by *Carta Mercatoria*, as appears by the writ pleaded and allowed *Communia Pasch. 35. E. 3. pro Johanne de Pan-try et Willielmo de Clapton collectoribus parva curie Londoniæ*, whereby the merchants of *Almaine* paying the duty upon a cloth imposed by 21. E. 3. are acquitted of the 12d. by *Carta Mercatoria*. But afterwards the Hanse merchants rather chose to pay the duty upon cloth sett *Carta*

* See 6. Rot. Parl. 67.—EDITOR.

ria, and were discharged of these new impositions made set by E. 3. as appears by the scheme above expressed.—Again, for pieces of cloth and narrow cloth, that were not chargeable by the *Mercatoria*, all aliens paid only their poundage until 21. E. 3. when a rateable imposition of 21d. per cloth was set upon pieces and narrow clothes; and then they paid not only their poundage, but also the rateable imposition. But *Communia* E. 3. *ubi supra*, the Hanse merchants paid only their poundage for such narrow clothes and remnants, and not the rateable imposition of 21d. for a whole cloth.—Again, whereas until the 21. E. 3. all merchants aliens paid only poundage of 3d. *per* for worsted of all sorts, and 21. E. 3. a rateable custome set upon them proportionable to a sack of wooll, whereupon merchants aliens were not only forced to pay the new impositions, but also 3d. *per lib.* for poundage; the Hanse merchants, who entered upon the last mentioned record, were discharged of the imposition upon worsteds set by the 21. E. 3. and paid only their poundage. Only for bedds of worsteds, they were forced to pay 2d. per bedd, over and besides their poundage.

And these differences were bottomed upon these exemptions, the Hanse merchants had by virue of the charter of E. 2. of new customes or impositions.

And although in some acts of parliament of the grant of tonnage and poundage the charge is laid equally upon all aliens, in some of the acts there is provision for the Hanse merchants charged only with their old custome 1. E. 6. cap. 13. But this day there is no speciall provision for the Hanse merchants of subsidies of tonnage and poundage, but they are equalled with other aliens.

The Hanse merchants had their divers vicissitudes.

In the times of H. 6. they were in displeasure with the English and the English with them. There were many violences and injuries used on both sides; and it grew to that height, that the acts of tunnage and poundage and other new subsidies, which were no provision for them; but contrarily there were many derogatory clauses in those acts, whereby they were excluded out into the same common consideration with other aliens. *Parl.* 31. H. 6. n. 8. And yet farther by an expresse act of parliament, viz. *Rot. Parl.* H. 6. n. all their franchises and privileges are resumed.

The resumption and suspension of their privileges continued all the time of H. 6. But E. 4. taking upon him the crown, the Hanse merchants fall in with the new king; and possibly he thought it his advantage to engage them; and from the first entrance of his reign he received them into great favor, which he continued all his life.

And whereas by reason of the acts of resumption in the time of H. 6. the Hanse merchants were charged with customes and duties and impositions as other aliens, especially as to cloth imported; the king, by his privy seal directed to the treasurer and barons P. 1. E. 4. and by judgment of the court of exchequer thereupon, discharged the Hanse merchants of the imposition upon cloth sett 21. E. 3. and they are only charged with the duty charged upon cloth by *Carta Mercatoria*, viz. two shillings of cloth of graine, eighteen-pence of cloth of half graine, and a shilling of cloth of assise without any graine. *Vide inter cetera perve custumæ in London' anno 1. E. 4.*

4. E. 4. cap. . in the act made against aliens merchants a special provision is made for the Hanse merchants, and a special clause for the confirming of their charters and liberties, viz. that the merchants of the Hanse having *Guildbaldam Teutonicorum*.

Rot. Parl. 13. E. 4. n. 2. the king reciting the former course of trade between the English and the merchants and people of the nation of Almaine, being under and of the protection, leige and company called the Dutch Horif, otherwise called the merchants of Almaine, and having the house in London called *Guildbaldam Teutonicorum* (note the description and restraint of the company) by special charters made and confirmed in parliament, all their charters are recited and confirmed; and it is particularly enacted, *that no prises, exactions nor prestations be sette uppon their persons or goods, otherwise than have been sette them any tyme before this c. yere nowe last or above.* The tenor of the king's confirmation in parliament, after the recital of the charters runs thus: *Nos considerantes, prefatos mercatores Alemanni mercatores Hanze Teutonice vulgariter nuncupat' in dicto regno et dominiis nostris, dictis suis privilegiis libertatibus concessionibus et in occasione guerrarum turbationum et hostilitatum jam nuper inter dictos nostros et ipsos de Hanzâ predictâ contingentium, desistit exinde tam ipsos quàm subditos nostros multipliciter fuisse et esse ex certis bonis respectibus nos moventibus, de advisamento et dominorum spiritualium et temporalium et communitatis regni Angliæ in presenti parlamento nostro existentium, et auctoritate dem parlamenti, et ex certâ nostrâ scientiâ, pro nobis et heredibus nostris et successoribus nostris ipsos mercatores Hanze in pristinum utendi et fruendi in dicto regno nostro et aliis locis nobis suis supradictis suis omnibus et singulis privilegiis libertatibus concessionibus et indultis, quo fuerunt aut esse debuerunt, si guerre turbationes et hostilitates hujusmodi non contigissent, reponend' et integrand' duximus, ac tenore presentium reponimus et intergemus, sic quod supradicti mercatores Hanze predictæ, et eorum heredes, universis privilegiis libertatibus concessionibus et indu-*

ut et frui debeant perpetuis futuris temporibus, eo modo quo usi
aut usi fuissent, si predicte guerre turbationes et hostilitates non
fuerint; ac preterea eisdem mercatoribus Hanze ipsa eadem pri-
vilegia libertates concessiones et indulta, pro se et suis successoribus,
obtinendo et ratificando innovamus et confirmamus, &c.

By the strength of this act of parliament and charter the for-
mer liberties of the Hanse merchants are revived, and indeed
are more strong and effectually; for whereas there possibly was
before a politick capacity or corporation settled, whereby
they might be capable to take in succession, or at least it might
have been questionable; the strength of this act of parliament, as
for the purpose at least of enjoying their liberties and house, gives
them a perpetuall succession, for the very implication of an act
of parliament may create a capacity.

But yet the bounty of the king towards these merchants of
Hanse rested not here. But *Rot. Parl. 14. E. 4. n. 15.* it is re-
corded, that, whereas for the reducing of the merchants of Almaine
out of the leige and confederation of the Dutch Hanse to the
intercourses of merehandize with the English it hath been
agreed between the king and the people of the said Dutch Hanse,
that the merchants of the Hanse should have a certain place with-
in the city of London, called Stillhof, otherwise the Stillyard,
and divers houses thereunto adjoining, to them and their succef-
sors, &c. and whereas the mayor and commonality of London
were seized of the place called the Stillyard under certain trusts ac-
cording to the will of John Reynwell, and likewise the bishop of
Chester and some other religious houses be seized of certain
lands adjacent, &c. it is enacted, that the merchants of
Hanse being of and under the confederation leige, and company
of the Dutch Hanse, otherwise called the merchants of Almaine,
shall have an house in the city of London called *Guildhalda Teuto-*
nica, that be or hereafter shall be, shall hold and enjoy to
them and their successors the said houses. Provision is made for
the performing of the charitable bequest, and also the king makes
a full compensation to the religious houses for their rents
and hereditances.

This is the first settlement of the house called the Stillyard upon

they had indeed formerly their *Guildhalda Teutonicorum*, or
common hall, but not the Stillyard in perpetuity till now.

Things are observable upon this charter, viz.

That it was not all the merchants of Almaine that had
these liberties; but the Hanse merchants which were con-
federate into a kind of trading body, and had their corporation,
settled at their Guidhall in London.

2. Here

2. Here is the name of their corporation and their cession, in which capacity they did take and to this day that house called the Stillyard.

By the statute of 19. H. 7. cap. 23. all acts touching merchandize prejudicial to the merchants of the Stillyard repeated to them and their liberties.

By the statute of 22. H. 8. cap. 8. whereby aliens and denizens are made liable to aliens customs, provision is made nevertheless for the Hanse merchants of the *Guildbalda Teutonicorum*, that they be not thereby prejudiced.

In the beginning of the reign of E. 6. there was a great care for them, insomuch as in the very subsidy of tunnage and portage, there is provision made for their indemnity against the increase of their customs.

But afterwards in the time of the same king they were countenanced, and by acts of state their privileges suspended.

In queen Mary's time, upon the account of religion as a state, they were again received into favour.

In the time of queen Elizabeth, upon the same account they were discountenanced.

In king James's reign they were again received into favour and their privileges countenanced by publick acts of the council.

In the beginning of the reign of king Charles the first they began again to be in discredit, in so much that in 8. Car. upon speciall commission an inquisition was taken, whereby it was found that their house called the Stillyard escheated or was forfeited to the crown. But little proceeding, that I can find, upon that inquisition.

Of very late years in the time of his now majesty the former proceedings in the time of his father were endeavoured to be revived, and a patent desired to be passed of their house called the Stillyard, upon pretence, that either it did not well pass for want of a sufficient corporation, or if it did that it was forfeited or dissolved. But this prevailed not; but by a special order of the council dated their title to the Stillyard was asserted, and all farther proceedings against them superseded.

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C A P. XIX.

*Concerning aliens at large, and who are liable to alien's
customs.*

appears by the several acts of subsidies of tunnage and poundage, and also by the *Carta Mercatoria*, that aliens were taxable with greater customs and subsidies than denizens were; hence grew great distinction between denizens and aliens in respect of customs.

Denizens were of two kinds, denizens born and denizens made. And it seems these paid their duties alike until the statute 7. cap. 2. whereby it is enacted, that any person made denizen shall pay like customs and subsidies as he had before he was made denizen, any letters patents or ordinances made to the contrary notwithstanding.

By the statute 11. H. 7. cap. 14. all merchants-strangers, others made denizens by the king's letters patents or otherwise, shall pay such customs inwards and outwards, as they should have paid if the same grants had not been made.

By the statute of 22. H. 8. cap. 8. the same thing in effect is enacted, viz. that they pay the same subsidy and custom as they should have paid before they were denizens, any grant or ordinance to the contrary made or hereafter to be made, or any act, statute or ordinance to the contrary made or had notwithstanding.

There is a provision, that it should not extend to be prejudicial to the merchants of the Still-yard; but that they enjoy the same privileges they had before this parliament.

On these statutes these things are observable, viz.

1. That an alien made denizen by letters patents before or after these statutes shall yet pay alien's customs; for those statutes are as to this purpose restrained and qualified his indennization to extend to customs.—But this is intended of a general indennization by letters patents; for the king may at this day, by special clause in his letters patents, either dispense with these statutes, or grant especially, that he shall pay customs and subsidies as a free-born denizen, notwithstanding these statutes; for this concerns only the king's interest.

2. That a person naturalized before those acts by act of parliament shall pay alien's duties. The reason is, because these acts to naturalizations precedent do derogate from their privilege, and that,

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1. By force of the words *letters patents or otherwise*.*
2. By force of the derogatory clause *any act, statute or ordinance to the contrary notwithstanding*.

And possibly this was one of the reasons why these statutes were so often renewed, viz. 1. H. 7. 11. H. 7. and 22. H. 7. to take off the privilege of the persons naturalized before these acts made.

(3.) But persons, naturalized by act of parliament after these acts, were exempted from the alien's duties; because they were by the act of naturalization rendered to all intents and purposes as if born in England, which concludes every man to say the contrary; and though an act of parliament may take away the force or effect of a precedent act of parliament, or of a present or future patent, yet it cannot take away the force of a future act of parliament.

In the latter acts of subsidies there hath been kept the distinction between naturall-born subjects and strangers, or aliens. And they have used the word *naturall-born subjects* and not the word *denizens*, which, as hath been said, is more extensive than the word *naturall-born subjects*. Yet the strength of a naturalization is so great, that he that is naturalized is a naturall-born subject within that act, and shall pay only as a naturall-born subject pays.

If an alien come into England, and have issue here, he is a naturall-born subject. Yet (I know not by what law) a naturall-born subject hath been decreed heretofore to pay the same duties. *Vide Decret.* Possibly it may be upon a reason of equity, because he is as in the next degree to an alien, and the reason is so near, that he is presumed more to favour them than the law. But this is now settled; for, by the statute of 14. C. 2. touching the customs, children of aliens under one-and-twenty years, not permitted to trade in their own names.—By 15. H. 8. c. 4. an Englishman sworn to a foreign prince shall not pay alien's customs.

* These words are in the preamble of the 22. H. 8. cap. 14.—EDITOR.
† 13. and 14. Car. 2. c. 11. s. 10.—EDITOR.



C A P. XX.

When customes and subsidies shall be said to be due, and when not.

TOUCHING the time when customes or subsidies shall be said to be due to the king, it will fall under a double consideration, viz.

In relation to goods exported, or customes outward.

In relation to goods imported, or customes inward.

As to customes outward, or customes of goods exported, it has been in part touched before in the consideration of the nature of the customes of woolls, woollfells and leather.

There are these two things that must concur to intitle the king to customes outward :

(1.) They must be shipped or laid on board of some ship or vessel to be exported.

(2.) They must be shipped to be exported beyond the seas, and immediately upon such shipping the king's duty of customes; and his duty also of subsidies outward, is vested in the king.

It appears by the original grant of the great customes of woolls, woollfells and leather, that it was to be paid of such goods, *ke vironē hors del realme*, that is, as soon as they are laid aboard a ship or vessell for that purpose, and before they arrive beyond the sea. For if the king should expect till they come to their foreign port, he might lose his goods; and the words of the grant of the petty custom by merchant-gilders for goods exported, namely of woolls, woollfells, furs and averdupoise, are, *quæ de regno nostro educent vel exportant*, as appears by the *Carta Mercatoria* before expressed; and yet those customes outward are due upon the lading them on board, before they are actually transported. In the grant of the subsidy of poundage, cloth, &c. it is much in the same stile, viz. one subsidy of poundage, to say, of all goods and merchandize, &c. *to be carried out of the realm or any your Majesty's dominions to the same* giving twelve-pence for every twenty shillings; and so in the subsidy of cloth to be exported, &c. 3s. 4d. And yet in these cases the duty grows due by the very lading on ship-board for that purpose; and that appears by the remedy or remedy that is given for it, viz. that if any merchandize, &c. at any time hereafter be shipped, or put into any boat or vessel, to the intent to be carried into the parts beyond the sea,

sea, &c. the customes not paid or the collector agreed with, they are forfeited; so that the very lading them in any ship in any boat to that purpose, intitles the king to the duty, and remedy for it by forfeiture of the goods.

Upon this that hath been said it appears, not only when duties outward are due, but also when they are not due.

If goods outward-bound are lost, or perish, by the sea or or pirates, or other casualty, yet the duty if unpaid is in the king's recovery, or if paid, it cannot be in strictness demanded back again. But in ancient time, the king usually granted privy seal in such cases, to enable them to ship out as many goods custom free in the same port. But at this day, and for many years in the acts of subsidy of tunnage and poundage, there is a settled provision for that purpose by the act itself.

If a merchant import or unlade foreign goods, and pay customes inward, and presently reship them again to be exported in strictness of law he ought to pay his customes outward. But by the favourable rules confirmed by act of parliament, in the book of rates he hath allowance, in some cases of the whole, and in some of the half subsidy, as the case requires.

If any man ship forth goods from one port to another in the kingdom, there is by law no subsidy or custome due, and for the constant usage when the great customes were only levied it appears by several writts to the customers of the ports where goods are landed. But then the course is, and always hath been for the exporter to take a coast cocquett, and give security for the discharging the same accordingly; and upon the bringing a certificate from the port of unlading to the customer of the port, where the goods were laden aboard, thereupon his bond is to be cancelled. *Vide stat. 33. H. 8. cap. 7. and 2. cap. 37. for brass and bell-mettall. Claus. 20. E. 3. p. 1. m. 4. V. Claus. 7. E. 3. p. 1. m. 4. customes paid and repaid certificate.*

II. As to the customes inward, and the times when customes or subsidies are due, the best measures of the time these duties grow due are these:

(1.) They must be imported from some place beyond the kingdom, for if they be carried only from one port to another within the kingdom, this is not any importation to intitule the king to the customes. And therefore, though foreign goods be imported into the port of London, and there duly pay their custom, and afterwards depart with their goods to the port of Hull, they are not to pay another custome at Hull. But then by the statute 3. H. 7. cap. 7. they must bring a certificate of the custome and particulars of the goods. Otherwise the goods are forfeit

ed at Hull, the customes there not paid. But if it be transferred from one creek or part of the same port to another part of the same port, there needs no such certificate, for the statute speaks of another port.

2.) The goods ought to be imported *by way of merchandize*; if they come in by reason of foul weather, or to escape pirates, or to take in fresh water; yea, though they unlade part of their lading or all of it upon such an extremity; yea, yet far-ther, though they sell within the port some part of their lading to defray of their casualties, as the mending their ship and buying of victuals, even by the common law they were to pay custome nor subsidy for any more than what was so actually

And this appears by divers precedents, as well before as after the statute of 28. E. 3. cap. 13. *Vide Claus. 43. m. 30. mercatoribus Almaniæ Spruce and Holland.* And accordingly they were wrecked upon the English coast, no custome by law to be paid for more than is sold. *Claus. 50. E. 3. p. 2. m. 8. Claus. R. 2. p. 2. m. 13.—Burgensibus Berwick Rot. Parl. 50. E. 3. Vide 14. E. 3. c. 21. 34. E. 3. c. 19. 38. E. 3. c. 8.—Reges in outre nosme 13. R. 2. c. 9. 3. H. 7. c. 7. 1. H. 8. c. 5. 6. c. 22.*

3.) At common law if a merchant had voluntarily come into port, and broke bulk and sold or unladed any part by way of merchandize, he should have paid his custome for the whole ship's lading; because by this act the merchant did in effect declare he came in by way of merchandize and trade. But, by the statute of 28. E. 3. cap. 13. confirmed by the statute of 20. R. 2. c. 4. the law was altered; and though the merchant came in voluntarily and broke bulk and sold or unladed part, he should not be obliged to pay custome for the rest of the ship's lading. And at that time by the first rule of the book of rates * that law is most fully settled, viz. *every merchant shall have free liberty to break bulk in any port allowed by law, and to pay custom and subsidy no more than he shall enter upon land.*—But these laws did not extend to prisage; and therefore at this day, if bulk be broken, prisage shall be paid for the whole ship's lading, as hath been resolved, as appears before in the chapter of prisage.†

4.) If clothes or other goods are exported out of Ireland into England, they shall pay a custome outward in Ireland, but no custome inward in England, no more than in a case of transportation from a port in England to another port in England; and though it be a differing kingdom, and therefore he shall pay there a subsidy outward, yet it is part of the dominions of

the end of 12. Ch. 2. c. 4.—EDITOR.
page 122.—EDITOR.

the crown of England, and therefore shall pay no subsidy in-
inward. *Rot. Parl.* 51. E. 3. n. 71. But if a merchant pay
subsidy or customes outwards in Scotland upon goods transported
from thence by sea into England, he shall pay custome or subsidy
inwards here, because they are different and independent king-
doms and dominions. But goods transported from Berwick
Newcastle or any other port pay neither duties inward or out-
ward, but are to be discharged by certificate by virtue of a
statute of 3. H. 7. c. 7. For Berwick, though part of Scotland
is by conquest annexed to England, and as to most purposes
thereof.

(5.) If goods are taken as lawful prize upon the sea, and im-
ported or brought into an English port, these prize goods shall
pay customes inward; and accordingly it hath been resolved.

(6.) When goods are imported *by way of merchandise* into a
port of England, great question hath been heretofore made
when the custome and subsidy becomes due, viz. whether
the coming into the narrow seas being the king's dominions,
whether by coming into the port, or by breaking of bulk,
entering the goods, or landing the goods.

In Michaelmas 4. Car. in the exchequer there was a note
case touching this matter by English bill between the lady Swinerton
executor of Sir John Swinerton and Sir John Wolstonholme and others,
which was to this effect. King James, having by act of parliament the
subsidy of tunnage of wines, and having by letters patents set a farther
impost upon wines, by indenture 16. May c. 9. Jac. granted unto
sir John Swinerton the said subsidy and impost, which at any time
after the feast of St. Michael last passed had happened, come, arisen
or grown due, or should might or ought to happen, arise, come, grow,
renew, be or payable to the king, his heirs or successors, of any sweet
wines, which, at any time or times within or during the time or term
therein mentioned, had been or should be brought from parts
beyond the seas into the port of London or members thereof; to hold
from the Annunciation next following for nine years. Sir John made
the plaintiff his executor, and then dyed, upon the 25th of March 1623,
which was the last day of the term. Divers sweet wines were imported
into the port of London, whereof were not entered till after the said
25th day of March, and some were entered in the custom-house upon
the said day of March, but not landed till after. So though the
questions upon the case were four, yet they were in effect but two,
viz.

1st. Whether the lady should have the subsidy and impost
of the wines imported within the term, but not entered after the term?

Whether she should have the subsidy and impost of the wines imported and entered within the term, but not landed till after the term?

In this case these points were resolved:

1. That if the grant of Sir John Swinerton had been of all the costs and subsidy of such sweet wines, as should be imported in the port of London within the space of three years, to be counted from the Annunciation next after the indenture; in case if the wines were imported within the term the lessee should have the duties, although they were neither entered nor landed within the term; because the grant carries the duties of these wines if imported within the term, though the duty become not due till after the term.

2. But according to the special penning of this demise it carries only such duties as grew due within the term; and therefore though the wines were imported within the term, yet if they do not rise within the term, these duties do not pass; and therefore it is necessary to enquire when these duties grow due. By the importing, or at least by the importing and entering, in they would belong to the farmer; because imported, and when they would be imported and valued within the term. But if the duty grows not due until the unlading, then they belong not to the farmer, because the unlading was not till after the term.

It was resolved by the court against the plaintiff by the opinion of Walter chief baron and Trevor against the opinion of Hamham, viz.

1. That the duty of tunnage by the act of subsidy, nor the duty of impost (if it were a duty) doth not settle by the importation.

2. That these duties grow not due by the entry of the wines in the custom-house; for notwithstanding the importation into the port, and notwithstanding the entry of them, yet the merchant may carry out the goods again for another port.

3. But that those duties grow due by the unlading, and not before.

And the reasons given were,

1. As to the impost. The kings letters patents create no duty, neither are the goods charged; but all that can be done for the recovery of the impost is only to hinder the merchant from unlading till the impost paid or secured.

2. As to the subsidy, the act gives not to the king any duty by the importation; but gives the king a forfeiture, if the goods be unladen the subsidy not paid, And therefore in conclusion

struction of law, the law gives it the king, when it gives the remedy, viz. by the unlading and not before, and accordingly it was decreed.

Now to say what I think of this matter ;

1. As to the ancient customes, as well great as small, it seems very plain,

1. That the duty did not grow due merely by the importation into the narrow seas, though part of the king's dominions ; neither was that ever practised ; for then the king should be intitled to the custom of all the goods that passed between Spain and the Netherlands, although they never intended to make any port in England, for which there is neither colour nor practice.

2. That the duty is not due only by the coming of a ship into an English port ; for so he might do for safeguard, or stay for a wind, and yet without any intention of merchandise ; and the customes are due only from such goods as are imported for merchandise, and not otherwise.

3. But if a ship imported any goods at common law into an English port *by way of merchandise*, when that doth once appear to the king by the common law was intitled to the customes of the goods imported in such a ship in such a port ; for the grant of the old customes is of all the goods imported *by way of merchandize*, and accordingly most certain was the practice at the common law.

4. But because the law neither can take notice of intention nor try them, without some overt act, there was in this case an overt act required to make it out, that the goods were imported by way of merchandise ; and that overt act was sale of part of the goods without any constraint ; and this is called breaking of bulk, and at common law such breaking of bulk were taken out *not* in a way of trade, but for necessity, as to repair or victual the ship upon an emergent necessity, this is not such a breaking of bulk, as intitled the king to the customes of the whole lading ; for it did evidence an importation of the goods to the intent to trade.

5. But though this were the common law, yet by the statute of 28. E. 3. c. 13. the common law was changed in this point ; and the merchant importing and selling part is excused from payment of customes for more than he sells ; though the duty extended not to prisage, as is before shewn.

And thus much touching the time when the duties of custom became due.

2. Touching the subsidy of poundage, the words of the act that grants or qualifies the grant, must determine. The usual manner of the grant is thus much of all wines, which shall come

be brought into any of the ports of this kingdom by way of merchandize, &c. Upon this grant, if it went no further, I should think it very plain,

1. That such an act creates a duty in the king, and he may originally sue for the duty itself as well as for the forfeiture, for standing goods the duty not paid.

2. That this gives the king this duty of all the goods imported by way of merchandize; and therefore, as in the former case of customes, so in this of the subsidy, if once bulk be broken and part sold, the king's farmers were entitled to the subsidy of the whole ship's lading; for now it appears by an overt act, that the whole lading was imported for that end.

But to remedy this mischief, in the first rule of the book of this is corrected; for it is thereby enacted, that the merchant shall pay subsidy for no more than he lands. So that at day, upon this reason, the duty of the subsidy commenceth by the unlading, and not by the importation by way of merchandize; for no duty is due for any more than what is unladen. Touching the commencement of the duty of import, I need not speak; for the truth is, it created no duty, as hath been said; and therefore it is impertinent to examine the time when it becometh.

C A P. XXI.

Concerning the entry of goods inwards and outwards, and how to be made.

THE entry of goods is nothing else, but a note in writing delivered in by the merchant or those employed by them unto the officer of the customes, containing the quantity either by weight or measure, and the marks and kinds of the goods by which they are imported or exported, to the end the king may be assured of the duty to expect, and the merchant may be enabled either to secure or compound that duty, so that he may lade or unlade his goods safely without forfeiture for want of due answer to the customes or subsidies due for the same. If the merchant be not fully certain of the quantity and nature of his goods, (which is very difficult in case of goods imported) he may enter them at his peril. But then if he lands his goods, and the officer upon weighing find him to exceed what is so entered, it will in such case be a forfeiture of what exceeds his entry; for he hath not paid nor compounded for that surplussage. The just and usual way, therefore, for preventing of loss to the king and

and forfeiture to the merchant, is to enter them by consensual estimate; and if they shall amount to more upon sight or weight when landed, that then he will be answerable for the subsidy custom of the surplusage. For this is a good agreement with the customer or comptroller, as it is resolved Commentaries 1. For the merchant's case; and thereby the merchant saves the forfeiture of his goods: for the customer ought upon such entry to grant the merchant a bill of sufferance or sight, to permit the merchant to land or lade his goods without seizure. And on the other side the king is secured his duty; for the entry being thus special, all the officers are allarmed to see the goods weighed or measured or examined, and by that means the short entry at first is made good by a post entry; and the king by that means secured of his duty for what is short entered at first; for the entry is that, where the king's duty is answered, and according to which the king's officers of his customs are to account.

We have seen what the entry of goods is, and why first consensual. But for the explication of this business we are to consider 1. Of what kinds such entries are. 2. By whom to be made. 3. By what laws. 4. In what manner.

Touching the kinds of such entries they are generally of two sorts, viz.

(1.) The entry of such goods, whereof in truth no customs are or can be due, viz.

When foreign goods already customed in one port are shipped to another port in the realm, then by the statute of 3. H. 7. c. 7. there ought to be brought a particular certificate of the goods so customed in one port to the customer of the other port of unloading; or otherwise must pay his customs again at the port of unloading; or if he lands them, such customs unpaid or no certificate made, the goods are forfeited.

Or where native customable goods are shipped in one port to be unladen in another port in the kingdom, the merchant ought to give in a particular of the goods in the lading port, and to the coast cocquet for the clearing of those goods, and give security for the carrying of those goods to the port designed, which is called port-bonds; which are to be discharged, upon the bringing back of a certificate from the unloading port that the goods there unladen.

(2.) The second sort of entry is for these goods, whereof customs outwards or inwards are due and payable. And these are of two sorts, either a pre-entry or a post-entry.

1. The pre-entry is that entry, which is made before the goods are laden aboard if to be transported, or before the goods imported

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unladen, containing the certain content and natures of such goods, to the end the king may be answered his duties, and the merchant saved from the forfeiture, by payment of his customes, agreement with the customer and comptroller for the same; if they be laden aboard or unladen without such payment or agreement, the goods are forfeited.

And this again is of two sorts, viz. the entry by the merchant owner of the goods, and the entry of the master or purser of the said ship or vessell.

Touching the pre-entry by the merchant, this is of two kinds, viz. an entry at sight, or an entry at the perill of the merchant.

The former is a generall entry of such or such goods by guess estimate, with an agreement with the customer, if, upon search or weight, it shall be found more or other than what is so entered, to be rateably answerable for it. And upon this the customers do, and ought to grant a bill of sufferance to unlade the goods; and if upon the search or weight, it shall prove to be more or of another nature, then the merchant is to make his re-entry of what is omitted, and answer the custome and duties accordingly. By this means the merchant is secured from the forfeiture of his goods, though laden or unladen before the full custom is paid, and the king secured his duty.

The second sort of pre-entry is, when the merchant enters his goods at his perill, wherein the danger is his; for if in truth the entry be not full and perfect, and the goods entered were not aboard, or inward are unladen, and it be discovered that there is a mis-entry, and thereupon the officer seizeth, the merchant loseth the goods whereof the customes are not in truth answered upon his first entry. But though this pre-entry be said at the perill of the merchant, yet if, before the shipping of the goods outward bound, or unlading of the goods inward bound, the merchant finds his error, he may supply it with a fuller entry. If the goods be so shipped or unladen, yet before seizure made, and so save the forfeiture of the surplusage of the goods before entered. And so is the constant practice; for as long as there is fair dealing in the main, so that the king is truly answered the duty, the merchant ought not to be caught or surprised for unwilling mistakes; and it appears to be such, when the merchant of himself rectifies it before a seizure.

And thus much for the pre-entry of the merchant.

Touching the pre-entry of the master, or purser, or other managing the government of the ship, the master or chief officer of the ship, he hath the bills of lading, and by that means he

he hath a kind of controul upon the merchant. And therefore to the end the king may have all the means possible, to prevent defrauding of his duties, the master, purser, or governor of the ship is to give an account of the goods under his charge; and the statute of 1. Eliz. cap. 11. he is to be examined upon his oath touching the goods in the ship; and if he shall refuse, or not truly answer, he is subject to the penalty of 100*l*. And by the statute of 13. and 14. Car. 2. touching the customes, the master or purser, is bound upon oath to make a just and true entry of the burthen and lading of every ship inward and outward, and of divers other particulars in that act mentioned, upon pain of 100*l*. And thus much concerning the pre-entry.

2. The post-entry is, as hath been shewed, when the merchant, not having made either a true or full entry before, but either made his entry upon sight, or, if his entry be peremptory yet afterwards discovering his error, makes a full entry of the goods imported or exported before seizure; and this is called post-entry.

If the merchant makes his entry at sight, and agrees if the be more he will supply his entry, and pay the surplussage of duty, this prevents all forfeiture; for he always may have in such case a bill of sight or sufferance to land his goods; and if upon search or weight, they appear to be more, he may of course make his post-entry of what was omitted in the former entry. But if he makes his entry at his perill, though before seizure he may supply the defect of his former entry with a new or post-entry, and so save his goods; yet if such post-entry in the case of an entry at perill, come not till after seizure, the post-entry in that case comes too late to save the forfeiture for the king, the informer is intitled to the surplussage uncustomed by seizure; and the merchant would have deceived the king if he could.—And thus much concerning the kinds of entries, and the grounds upon which they are made.

Now touching the quality of the entries by the merchant, is required generally in them, that they be true, viz.

1. True in respect of the nature or quality of the goods whereof before.

2. True in respect of the owners or proprietors.

By the statute of 3. H. 7. cap. 7. it is enacted, that no merchant denizen nor stranger enter any goods exported or imported, but in the name of the true merchant owner of the goods, upon pain of forfeiture of the goods.

By this act, if one Englishman had entered goods in the name of another Englishman, or one alien had entered in the name of another, though the king thereby had not been at any prejudice in the custome

comes, the goods had been forfeit, as well as if an alien that
greater customes had entered his goods in the name of an
Englishman.

By the statute of 1. H. 4. cap. 5. this is rectified; and it is
acted, that an Englishman may enter in the name of another
Englishman, or one stranger in the name of another stranger.

But no stranger or denizen shall enter in the name of another,
whereby the king should lose his customes or subsidies; nor no
subject free of prisage but butlerage should custome in his own
the goods of another, upon pain of forfeiture of the goods
other penalties.

By the statute of 2. E. 6. cap. 22. the statute of 1. H. 7. is
firm.

But by the statute of 1. Eliz. cap. 11. it is again enacted, that
person enter any goods imported or exported in the name of
other person than in the name of the very owner thereof, not
sold before such entry, or before the arrival of the wares
beyond the sea, upon pain of forfeiture. So that this sta-
seems to prohibit one Englishman to enter in the name of
other, or one alien to enter in the name of another alien,
though the king be at no loss thereby, as well as such an entry
an alien to enter in the name of an Englishman, or such
entry whereby the king is at a loss in his duties. And this
statute stands in force at this day. But yet the practice by in-
gence and connivance hath run contrary; for I have not
own any questioned for a false entry in another's name upon
statute, unless by such entry the king hath been at a loss in
customes; as where one subject to alien's duties enters in an
Englishman's name, or where one not privileged from prisage
customes enters in the name of one that hath that privilege
the whole or at least in some part.

C A P. XXII.

*shall be said a shipping to entitle the king to the subsi-
or other duties of things imported; and what an un-
shipping, &c. to entitle the king to the duties inwards.*

HAVE before shewn, that as things stand at this day by
force of the act of tunnage and poundage of 12. Cha. 2.
the rules of the book of rates which were part of that, as
duty outwards grows due before shipping, so no duty inwards
grows

grows due before unlading. So that the unlading is the beginning of the duty inward at this day, and during the continuance of the subsidy of tunnage and poundage now in force.

Although, as I have before observed, the king hath the benefit itself vested in him by the act, for which he may sue without demanding the penalty, yet the statute hath provided a more effectual remedy for the king's duty, viz. forfeiture of the goods for which custome is due but substracted. And the ordinary means at this day for the king's relief in case of such substruction is to inform for the forfeiture of those goods of which the custome is so substracted.

The great clause upon which this forfeiture depends is this: "If any wines, goods, or other merchandize, whereof subsidies aforesaid are or shall be due, shall at any time be shipped or put into any boat or vessell, to the intent to be carried into the parts beyond the seas, or else be brought from the parts beyond the seas into any port, place or city of this realm, or other your Majesty's dominions, by any way of merchandize, and unshipped to be laid on land, the subsidy, customes and other duties due or to be due for the same not paid or lawfully tendered to the collector thereof, his deputy, with the consent and agreement of the comptroller and surveyor there or one of them at the least, nor agreed with for the same in the custom-house, according to the true meaning of this act; that then from the said 24th of June next all the same wines, goods and merchandizes whatsoever shall be forfeit to your Majesty, the one moiety of the rate thereof to your Majesty, and the other moiety to him or them who shall sue for the same."—By this clause all the questions concerning the subsidy of tunnage and poundage are guided; for during the continuance of this subsidy no other customes are on foot, but all suspended, as hath been shewed by the expresse provision of the last rule in the book of rates. Therefore I shall somewhat largely examine this clause and several parts of it.

I. In reference to customes outwards there will be these questions:

(1.) What shall be said a shipping or putting into any port to the intent to be carried into the ports beyond the sea.

(2.) What shall be said goods or merchandizes so shipped, whereof any subsidy shall be due.

II. In reference to goods imported:

(1.) What shall be said goods or merchandizes imported, whereof any subsidy is or shall be due.

(2.) What shall be said an unshipping to be laid on land.

III. In reference to the payment :

(1.) What shall be said a payment, what a tender, what an agreement within the intent of this act.

(2.) Who shall be said a collector within this act.

IV. In reference to the forfeiture :

(1.) What the forfeiture is, or when, or how it begins, or is consummate.

(2.) What is a seizure, and who a seizor, within this act, to be intituled to the moiety.

Touching the first of these, viz.

(1.) What is a shipping to be transported beyond the sea.

If goods are laid into any boat or lighter or bottom, to be conveyed to any ship in or out of the port, to be from thence carried into the parts beyond the sea, the first lading into that boat or vessel the customes unpaid gives the forfeiture.

If goods are laden into any port in England to be transported to Ireland or Scotland, this is a loading to be transported beyond the sea ; though Ireland be part of the dominions of England ; because it is a different kingdom, and the customes due here, though the customes being paid here, they ought to be charged with other customes in Ireland.

If goods are laden aboard in any port in England, Wales or Berwick, they are not to pay any customes or duties outwardward. But then they ought to have a coast-cocquett, and security to unlade at such a port, and bring back to the same port from the port of discharge within six months a certificate that the goods are accordingly unladen there. *Vide* Statute 14. Car.* concerning the customes.

(2.) What shall be said goods or merchandise.

The wearing-apparell of any passenger, not the goods or furniture of any embassador or servant of the king or other foreign minister for his ordinary use, and not for traffick or merchandise, are not goods or merchandises chargeable with these duties. Yet to prevent deceit on the one side or danger of loss on the other side, these goods are not laden nor unladen without a bill of sufferance from the officers of the customes. Furniture, victuall, table, ammunition, or apparell, for

* 13. and 14. Cha. 2. c. xi. l. 7.—EDITOR.

the ordinary use of the ship, and not for trade or sale, are goods or merchandise chargeable with custome outward or ward.

II. In reference to goods imported :

(1.) What are goods or merchandises imported by way of merchandise.

Something of this hath been said immediately before, which need not be repeated.

If a ship and goods be driven into a port by foul weather or some leak of the ship, whereby the merchants are enforced to land their goods for saving them, or the necessary repair of the ship, but with intent to re-lade them again ; this is no such unloading as to intitle the king to the customes. Yet, for the security of the king against deceit and the merchant from the danger of seizing, it is safe and fit for the king's officers to be acquainted with the unloading, and to suffer a bill of lading to be gotten, if the exigence of the occasion will permit.

If goods be taken upon the sea by way of reprisal or prize and brought into a port in England, they ought to pay the duties ; for they are imported for sale, and so by way of merchandise. And so it was resolved in 38. 39. *Eliz. in sacchario, n. Howell and Hall.*

The same law seems to be for goods taken up by the lord of any manor or other seized as wreck, or seized upon the sea by the admirall or his deputy, as flotion, jetson and lagon.

The prisage of wines, viz. a tun before the mast and a tun behind the mast, ought not to pay any tunnage or other duty, though the king hath lett them to farm. For a custom shall not be paid of a custome to himself ; and though the prisage be lett to farm, the farmer hath it still in right of the crown, and therefore he shall pay no tunnage for it. And accordingly it hath been often resolved. But otherwise possibly may be, if prisage be claimed by a subject by prescription or charter.

The freemen of London and barons of the cinque ports ought to pay full custome and subsidy of their wines, though they have a discharge of prisage by the king's charter, and in the same manner claim the same under the king's grant. And this is clear, because though it be a grant by the king, yet it is a grant by way of discharge.

(2.) What shall be said to be an unshipping to be laid on land

If a ship laden with salt or other foreign goods come to any port of England, and there sell her lading to any other ship in the same port to be transported beyond the sea, accordingly the same is unladen into that other ship and transported ; though these goods were never brought on land,

much as this is done in the port, this is an unshipping to be on land, within the construction of this act, and the king shall have a double custome, viz. a custome inward, and a custome outward in that case. And accordingly it was resolved, *Eliz. in scaccario*, in a case cited *per* Walter in Swiner's case. *Vide* Comment. 7. *per* Gawdy.

If a ship come into a port and unlade part of her lading, to be disposed of by way of merchandise, at common law custome to be paid for the whole lading; but at this day, no more to be customed but what is landed, as hath been shewn in the chapter.

If goods be unladen by mistake of the merchant, his servant or mariner, this is not such an unlading as will give a forfeiture, if the customes were not paid for the same.—The case was a merchant having consigned unto him, a barreil of thread in one sack, and a barreil of coarse inckle in another, but the marks in the invoice mistaken, he enters the inckle, and pays his custome thereon, but by the mistake of the marks, takes up the thread instead of the inckle, which being landed and opened by the lander, appeared to be thread, and was thereupon seized as for a forfeiture. But because it appeared to be a mere mistake, it was not upon evidence to be no forfeiture. But if upon the circumstances it had appeared to be done by design, to save the custome of thread, which were greater than the others, then it had been a forfeiture. And therefore the circumstances govern in this case.

The 27. E. 3. st. 2. cap. 19. no merchant is to lose or forfeit his goods, for the trespass or offence of his servant, unless it be by the command or procurement of his master, or that he hath offended in the office in which his master hath sett him, and most of the pleas in the time of E. 4. H. 6. &c. in discharge of forfeitures for non-payment of customes, were grounded on this act.

In reference to the payment of customes.

What shall be said an agreement within this act.

A merchant having a parcell of goods to unlade which pay by weight; but before he doth know the certain weight of, and before the goods unladen, it is agreed between the merchant and the collector, with the consent of the comptroller, he will pay what is due, when the same is weighed; and upon the goods are unladen, though without a bill of lading, and seized; this is a good agreement within the act to avoid the forfeiture, and accordingly adjudged in the Comment. *Alia's* case, because reducible to certainty.

Who shall be said such an officer with whom such agreement may be made.

1. 1.

Q

An

An unlading of goods, by the consent of the land-waiter, or searcher, is not such an unlading by agreement required in the act; for these are not officers authorized for that purpose; for the statute is, that the agreement ought to be by the collector by the consent of the comptroller and surveyor, or one of them—And here note, that in every port of England there are a collector * and a comptroller, but only in the port of London a surveyor; and these are officers by patent of the king.

If there be a collector or comptroller *de facto*, though he be not such *de jure*, yet an agreement with such an officer is good for the merchant cannot take notice of the title of the officer.

A collector in the port of S. makes B. his deputy, who makes C. his deputy. A merchant importer agrees with C. and the comptroller to answer all customs which should be found due on the view of the goods. Ruled, that this is a good agreement, though at first uncertain, and though made with one that is not a deputy of a deputy.

IV. As to the point of forfeiture.

(1.) Though a title of forfeiture be given by the lading or unlading, the custome not paid, yet the king's title is not complete till he hath a judgment of record to ascertain his title; for otherwise there would be endless suits and vexations; for it may be ten or twenty years hence there might be a pretence of forfeiture now incurred.

The king's judgment is upon an information, which may be either for the king alone, or for the king and informer; these informations are of two kinds, viz.

An information without a seizure, where the furnise is, that goods uncustomed came to the hands of the defendant; which if the defendant be convicted, he answers the value of the goods.

Or else an information upon a seizure, which is against a person certain; but the party, that seizeth the goods as uncustomed, prefers an information in the exchequer, praying that the goods may remaine forfeit; upon which there goes out a writ to appraise the goods, and upon the return of the appraisers a proclamation is made, that if any man will come in he shall be heard. If upon or before this proclamation, the owner will come in and claim property and plead, he may thereupon have the

* Antiently the *customer* and *collector* were one and the same officer; and seem to have been in lord Hale's time. But now in some ports, as in Bristol, is both a customer and a collector. See Crouch's Compleat Guide to Officers Customs 2. and 4.—EDITOR.

vered upon security, if the same be *bona peritura* *. But if
e come in to plead to their forfeiture, judgment is given that
goods remain forfeited. And thus judgment concludes the
y's interest; and it is but reasonable it should do so; for he
notice of the suit,

By the seizure.

By the appraisement, which is publickly done in the cust-
house by the king's writ.

By the proclamation in that court, which is known to be
public place, whereunto all matters of this kind do come; for
information of this nature lyes in any other court in England.
king may inform upon a *devenit* in what court he pleases.
there cannot be an information upon a seizure thus to con-
n goods by proclamation, but only in the court of exche-
; and the reason is, because upon all such seizures every
on concerned may have and know a certain place to resort
for his remedy in this kind.

.) Who may thus seize and inform upon a seizure.

common law any person might seize uncustomed goods to
use of the king and himself, and thereupon inform for a
re. But yet if A. seize goods uncustomed, and then B.
them for the same cause, he that first seizeth ought to be
rred as the informer. And therefore if B. that seized after,
inform, and A. also inform, A. may be admitted to inter-
with B. upon the priority of the seizure, before the mer-
t shall be put to answer either.

at now by the statute of 14. Car. † for regulation of all cust-
s, none are to inform for non-payment of customes, &c.
uch as are authorized by the treasurer, chancellor of the
quer, or farmer of the customes.

the king grant to the admirall all derelict goods found in
a, flotson, jetson, &c. and a merchant exports tinn uncul-
; and to save the forfeiture and seizure casts it over-
har the port; though this as to some purposes be derelict
and therefore if there were no more in the case would
to the admirall against the king by virtue of this grant,
asmuch as the king hath a title to this as forfeit for non-
ent of customes, which title is not granted over, the king
ould those goods notwithstanding the grant to the admirall.
upon this account a prohibition was granted to the admirall
in this court ‡ to stay their proceeding there to condemn

as to this matter 13. and 14. Cha. 2. c. 11. f. 30. — EDITOR.

13. and 14. Cha. 2. c. 11. f. 15. and 17. — EDITOR.

MS. is deficient in not mentioning what court. But the court of exchequer
meant. — EDITOR.

those goods as jetson for the duke of York, lord high admiral.
P. 17. Car. 2.

And thus much shall suffice for this clause of the act of tunage and poundage, which is of daily use, and explains much of business.

C A P. XXIII.

Concerning the times and places for lading and unlading goods.

BY the statute 1. Eliz. cap. 11. every person that is to load or unlade any merchandize into or out of any ship between the first of March and the last of September, ought to do it between sun rising and sun setting, and from the last of September till the first of March, between seven in the morning and four in the afternoon, upon pain of forfeiture of the goods.

After due entry and agreement made with the customers, and inwards bound, between the last of September and the first of March, unloads her goods into a lighter about twelve o'clock at noon, which come to shore *aquâ inde refluxâ* about five o'clock, and the goods are unladen after four o'clock. Ruled, that, inasmuch as the bringing to shore *aquâ inde refluxâ* was before four of the clock, this was a discharging and unloading on land before four of the clock within the statute; and the forfeiture saved. *M. 38. 39. Eliz. in scaccario.* Howell Hall, Crook n. 67. *

As that statute provides for a forfeiture upon the merchandise in case of shipping or unshipping at prohibited times, so the statute of 14 Car. 2. † gives a penalty of 100l. against the wharfingers and bargemen.

The statute of the 1st Eliz. as it limits the times of loading and unloading, so it limits the place under the like penalty of forfeiture of the goods, viz. at such keys, wharfs and places as the queen shall appoint by commission before the first of September in the ports of London, Southampton, Bristol, Wexford, Newcastle, and the suburbs thereof, and in some open wharf, key, or wharfe, in all other ports, creeks, havens, or rivers, Hull only excepted, where a customer, comptroller, searcher, or the servants of some of them, have been for the space of ten years last past accustomedly resident ‡.

* Leak and Michel for themselves, and the queen v. Howell and Hall 532.---EDITOR.

† See 13. and 14. Cha. 2. c. 11. s. 7.---EDITOR.

‡ 1. Eliz. c. 11. s. 2.---EDITOR.

And by the statute of 14. Car. 2. * for the regulation of the
 homes, power is given to the king, by commission to assign
 places or ports (Hull excepted) for lading and discharging
 ships, and also to sett down and appoint the extent, bounds
 limits of ports, and it is enacted, that no person shall lade
 unlade merchandizes imported or to be transported, but only
 such open keys, &c. as shall be so assigned, without special
 licence first had from the commissioners and officers of his
 majesty's customs, upon pain of forfeiture of the goods.
 If a ship bound for Yarmouth or Newcastle pass along the
 downs by Dover, and it is to unlade goods by the way, in
 absence of laws he ought to come into the port and there make
 unloading and entry. But, because oftentimes the ships un-
 lade *in transitu*, and cannot conveniently come into the port, if
 merchants give notice thereof to the officers of the custom-
 house timely, so that they may have opportunity to examine the
 goods before they are landed, this hath been constantly allowed
 in favour of the merchant. But if he doth it by surprize and
 seek to deceive the king of his customs, it is a forfeiture of the
 goods; and the circumstances of the manner and secrecy and
 reasonableness of bringing in the goods are an evidence to
 prove such deceit.
 And thus much for the times and places of lading or unloading
 goods imported or to be transported.

C A P. XXIV.

*Concerning repayment of customs or duties once paid, upon
 emergencies.*

By the common law, if a merchant had once paid his cus-
 toms outwards, though the goods were lost before they
 came to their port of discharge, there was no remedy to have
 the same repaid, but by a petition of grace to the king, upon which
 the king was frequently granted, viz. that he might
 have out as much goods as the loss amounted to custom-free.
 But because of the charge and trouble of obtaining mandates
 under the great or privy seal for that purpose, of latter
 years provision hath been made by the act of tunnage and pound-
 age that the merchants shall have that allowance upon proof
 of loss made †.

† 3. and 14. Cha. 2. c. 11. s. 14.—EDITOR.
 and 4. of the 12. Cha. 2. c. 11. contains a provision of this sort—EDITOR.
 And

And also by the book of rates there are several rules for encouragement of trade, for allowance, sometimes of the custome, sometimes of the third part, and other allowances cases of exportation of forreign goods within certain times which are needless to be repeated, because they are all sett down there at large.

And divers allowances are made by the same rules, viz. to fix what shall be allowed custome-free for wrappers or packers, what shall be allowed in wines for outs, that five *per centum* allowed upon all goods, and what shall be allowed for leakage twelve pounds *per centum*.

Touching that allowance it was ruled 15. *Car. 2. in lease* that a merchant importing wines may, if he please, fill up his wines that are imported and in the port, and pay custome full tunns and hogsheds or pipes. But if he shall so fill up, he shall not have allowance for leakage. And the reason is, because the allowance for leakage was at first by contract or capitulation between the king's officers and the merchant, viz. to have much allowed in respect of the leakage and decay of his wines between the lading and importing of them; and in that capitulation there was provision, that the merchant should fill up his vessells, if he would have the allowance of 12 *per centum*; and as it is continued by the same name, so it is continued upon the same account, viz. if the merchant will custom his wines by the vessell or cask, he shall have the allowance; but if he will custom by the content, he shall not have the allowance. And accordingly it was resolved. *Car. 2^{di}.*

C A P. XXV.

Concerning the customes of Newcastle coals, its original and progress.

IT appears by the parliament roll 9. H. 5. n. 35. *inter petitionem communitatis*, that the king was answered two-pence *per chaldron* for every chaldron of coals sold in Newcastle to those who were not free of the town of Newcastle; and thereupon commissions are directed to be issued to examine the quantity of keels, in which such coals are laden, which should contain twenty chaldrons; and accordingly the king's duty was assessed, viz. 3s. 4d. for every keel, though they were often larger, whereby the king was deceived.

The mayor and burgesſes of Newcaſtle obtained a charter in H. 6. and by the general words they claimed this two-pence per chaldron as a toll, though the words of the charter ſeem not to carry it.

Yet under the pretence of this charter they enjoyed the ſame toll from the buyer, and employed it by their caſtmen towards the repair of their bridge and port, as appears by an inſtitution taken in the H. 6. and their conſtant uſage ever ſince; and becauſe it was at leaſt doubtful whether the words of the charter carried it, they claimed it by preſcription. See ſuit, as I take it, in the exchequer-chamber by Duncomb and others plaintiffs againſt the mayor and burgesſes of Newcaſtle touching that duty of two-pence per chaldron.

About 40. Eliz. they were queſtioned at the council-table by Hill for the ſame, and for the arrearares of the ſame as due to the crown. But upon proof of long payment for fifty years the mayor and burgesſes, the petition of Hill diſmiſſed.

Yet the mayor and commonalty, being awakend by this, for a better ſecurity in 42. Eliz. renewed their charter, got theſe things confirmed to them, and the arrearage diſcharged; and in reſpectation thereof granted to the crown twelve-pence per chaldron for every chaldron of coals exported and ſold.

In the parliament 1. Car. a bill was twice read and committed to the reſolving of the ſaid two-pence per chaldron to the crown; but it came to nothing.

Although upon a ſtrict examination ſuch a grant could not ſerve any other intereſt but their own, and men were much ſatisfied therewith; yet the payment of twelve-pence per chaldron to the crown continued, though with ſome diſſatisfaction.

But in the bill of ſubſidy and tunnage † and poundage, among the rules given touching the ſame in the end of the book of rates, wherein there is a ſpecial proviſion for the diſcharge of other duties to the king upon goods imported and exported other than the duties ſettled by that act, there is an exception of the ſaid tollage and of this duty of twelve-pence per chaldron ‡.

In 1655 a book was published on the ſubject and addreſſed to Oliver Cromwell, entitled, "England's Grievance in reſpect to the Coal Trade," Sec. "by Ralph Gardiner, of Chriſten in the county of Northumberland, Gent." The book is ſmall, but may be ſeen in the collection of printed books at the Britiſh Muſeum.

11. Cha. 2. c. 4.—EDITOR.

The words of the exception are very ſtrong, viz. "Nevertheless it is declared, that the duty of wines, the duty called butlerage, and the duty of twelve-pence of every chaldron of ſea-coals exported from Newcaſtle upon Tyne to any other port ports of this realm ſhall be continued."—EDITOR.

By

By this exception that duty becomes now settled and unquestionable*; the farm whereof is well worth to the crown six thousand pounds per annum.

And by the late act of parliament for the rebuilding of the city of London there is a further sum of twelve-pence per chaldron imposed upon all coals imported into the port of London above the duties formerly due.—And thus stands the state of the customs for coals at this day, viz. 29. Martii 1667.

C A P. XXVI.

A general discourse touching the customes of clothes as exported as sold within the kingdom; and therein concerning alnage.

THE customes of clothes were anciently and are at this of two kinds, viz. the custom of clothes exported by way of merchandize, and the custom of clothes sold within the kingdom, or the subsidy of alnage. I will examine them both together in this and the ensuing chapter, that so the whole business concerning the duties upon cloth may be laid open to entire view.

I. Touching the custome of clothes exported, this hath been in a great measure finished in the ninth chapter, wherein the several instruments touching the same are recited, to which I have often refer'd, and this shall be but a kind of extract of that business.

The customes or impositions upon clothes exported were of two kinds or originals, viz.

(1.) That which began by force of the *Carta Mercatorum*, which was for clothes exported by aliens.

* Before the 12. Cha. 2. two circumstances had occurred, tending to confirm the duty upon coals at Newcastle.—1. In the petition of grievances addressed by the commons to James the first in 1610, one chief aim of which was to condemn the imposition at the ports by prerogative, this duty is distinguished from those they plain of, because it began by *contract and grant*, and not under a mere pretext of royal prerogative, as they represent the one shilling duty then payable on coals at Blythe and Sunderland to have commenced. See State Trials, vol. xi. page 66. 2. The statute of 21. James 1. c. 3. against monopolies contained a proviso in favour as well of the privileges of selling and carrying coals at Newcastle exercised by the fraternity of hoast-men there, as of the duty of one shilling per chaldron for which they granted to the crown in consideration of that privilege. See 21. James 1. c. 3. §. 12.—EDITOR.

1) The second was that which began by imposition about 20 E. 3. as well on denizens as aliens.

2) Touching the former of these, viz. those sett by *Carta Mercatoria*, the copy whereof is inserted *supra*, cap. 7. * they these :

2s. of every cloth of scarlet or dyed with grain,

1s. 6d. of every cloth in which there was part grain,

1s. of every other cloth without grain.

these customs charged all aliens, whether they were the merchants of the Hanse or others, and seem to extend as well to goods imported as to those exported.

but this extended only to whole clothes; for if only parcells to be exported, or that cloth was cut into garments and sold, aliens paid only their poundage as for averdupoise, 3d. for the value of every 20s.

to remedy this by the statute of 11. H. 4. above mentioned, cap. 8. aliens were to pay their customes by *Carta Mercatoria* and also the impost or custom sett 21. E. 3. hereafter mentioned, proportionably and rateably for such pieces of clothes and rents in proportion to whole clothes.

and sometimes they paid for the same pieces also their poundage over and besides; but this was sometimes remedied.

The Hanse merchants did sometimes pay for these pieces as merchants-strangers; but in the time of king E. 4. when their privileges were revived and favored, they paid only their poundage for garments and pieces of clothes, inasmuch as they might enjoy the privilege of *Carta Mercatoria*, and were not charged with new customes or impositions; and such was reckoned, viz. to pay rateably for pieces of clothes and rents.

1) The second duty upon clothes was that which began by imposition in the time of E. 3. and had the countenance of a confirmation by parliament 21. E. 3. as appears by the petition and answer concerning the same, mentioned *supra*, cap. 9. † and with this equity, that whereas the king had a custom of licence settled in him of woolls exported, viz. of every sack of wool exported 6s. 8d. and of aliens by *Carta Mercatoria* of wool 10s. and about 20. E. 3. much of the wooll of the realm was trapped into cloth and exported in that manufacture, it was thought just, that the king should have a proportionable benefit of wool exported in manufacture, as if exported in specie. And the reasonableness of that construction that duty was settled upon, and hitherto continued with some alterations; viz. was imposed 20. E. 3.

Ante, p. 157.—EDITOR.

† lb. p. 166, 167.—EDITOR.

1. Upon

(2.)

1. Upon every woollen cloth without grain exported,
 By denizens - 14*d.*
 By aliens - 21*d.*
2. Upon every cloth of worsted exported,
 By denizens - 1*l.*
 By aliens - 1*d. ob.*
3. Upon every bedd of worsted exported,
 By denizens - 10*l.*
 By aliens - 15*d.*

This bears some proportion to the custome of woolls. But was not all; for in a little while they took consideration of various values of cloth, not only in respect of the material, in respect also of the species of the cloth. And in that respect imposition upon clothes without graine indeed were at 14*d.* for denizens, and 21*d.* for aliens, viz. a third part more according to their different proportion of customes of wooll. But after there was this addition,

1. Upon a cloth of whole grain or scarlet exported,
 By denizens - 2*s. 4d.*
 By aliens - 3*s. 1d.* and after that 3*s. 6d.*
2. Upon a cloth of half grain exported,
 By denizens - 21*d.*
 By aliens - 2*s. 7d.*

It rested thus for the most part of E. 3. and R. 2.'s time downward to the time of E. 4. only as is before shewn, cap. was extended to new manufactures in the same proportion to kerseys *Rot. Parl.* 15. R. 2. n. 43. to clothes made into gowns stat. 11. H. 4. cap. 7. to Cornish and Devonshire cloth called streits *Rot. Parl.* 2. H. 5. par. 1. n. 39.

In the 2d year of E. 4. the rates of the customs for cloth thus, viz.

- Of every cloth of assize or whole cloth exported,
 By denizens - 14*d.*
 By aliens - 21*d.*
- Of every cloth of scarlet, or whole grain exported,
 By denizens - 2*s. 4d.*
 By aliens - 3*s. 1d.* and afterwards 3*s.*
- Of every cloth of half grain exported,
 By denizens - 21*d.*
 By aliens - 2*s. 7d.*

And over and besides these rates, the aliens paid their custom for cloth set by *Carta Mercatoria*, viz. 12*d.* for a cloth with grain, 2*s.* for a cloth of whole graine or scarlet, and 18*d.* for

of half graine; but they paid no poundage, viz. 3d. per
for these clothes.

But the Hanse merchants, some time in the time of E. 3. were
sent to pay the imposition custom upon clothes, according
other merchants did, and were acquitted of the custom sett by
Carta Mercatoria. But afterwards, especially in the time of
they took advantage of their revived privileges, and were
upon discharged of all those imposition-customs upon clothes,
only answered the custome sett by *Carta Mercatoria*, viz.
shillings for a cloth of whole graine, 18d. for a cloth of half
graine, and 21d. for a cloth without graine.

But besides this imposition upon clothes thus inhaunced in the
of E. 4. the impositions upon worsted were also inhaunced,
1. On pieces of worsted. 2. On bedds of worsted.

For pieces of worsted.

For a single piece of worsted exported,

By denizens - 2d.

By aliens - 3d.

For a double piece of worsted exported,

By denizens - 2d.

By aliens - 3d.

For bedds of worsted exported,

For single bedds exported,

By denizens - 5d.

By aliens - 7d. ob.

For half doubles exported,

By denizens - 7d.

By aliens - 10d.

For doubles exported,

By denizens - 10d.

By aliens - 13d. ob.

But besides all these imposed customes, the aliens paid their
per pound upon all sorts of worsteds by virtue of *Carta Mer-*
Carta Mercatoria. Only the Hanse merchants of the Stillyard in the time
paid only 3d. per pound upon all sorts of worsteds by
Carta Mercatoria, and were discharged of the imposed customs
worsted by virtue of their privilege which was then reviv-
only they were charged by some composition, as it seems,
2d. for every piece and bedd of worsted, besides their poun-
by *Carta Mercatoria*.

And

And thus stood the customes upon cloth by imposition till time of queen Mary; during all which time it is observable, the proportioning of the custom of cloth, both upon aliens and denizens, was not with regard to the value of the subsidies of wooll, which were sometimes very great, but only with regard to the old custom of woolls of half a mark upon denizens, and shillings upon strangers for a sack of wooll.

Queen Mary had the subsidy upon woolls granted for her viz. 33*s.* 4*d.* of English, 3*l.* 6*s.* 8*d.* of foreigners, besides the old customes of wooll, which amounted to 40*s.* upon English, 3*l.* 16*s.* 8*d.* upon foreigners. And by a decree of the council and 5. P. and M. before mentioned*, there was an increase of the old imposition on cloth in some proportion to the subsidies and customes; viz. They computed four short cloths to amount to a sack of wooll, and thereupon sett an imposition in some proportion, though not fully answering the custom and subsidy of a sack of wooll, viz. upon English 6*s.* 8*d.* for every short cloth, which amounted to 26*s.* 8*d.* for four cloths, and upon aliens 14*s.* which for four cloths came to 58*s.* which was short of the subsidy for a sack of wooll.

And proportionably the customes of kerseys, streits, &c. were reduced in proportion to the broad short clothes.

Thus the imposition or custom upon clothes continued till Jac. at which time the king having the like subsidy of wooll granted him, viz. 33*s.* 4*d.* by English, which together with the old custome of 6*s.* 8*d.* amounted to 40*s.* and 3*l.* 6*s.* 8*d.* of foreigners, which with the old custome amounted to about 100 pounds, it was found, that the customes formerly taken upon clothes did not amount to the proportionable subsidy of wooll; therefore the custom or imposition upon every short cloth of denizens was reduced to 10*s.* and the like rateable proportion increase made upon clothes exported by strangers answering their subsidy and custome of woolls, which were called pretermitted customes.

This, with various complaints and some intermissions, continued till taken in the time of king James.

At this day by the act for tunnage and poundage, the custom or subsidy of cloth exported is reduced to 3*s.* 4*d.* upon English, and 6*s.* 8*d.* upon foreigners; and so it stands at this time.

And thus far of the customes and impositions of cloth exported.

* Ante, cap. 14.—EDITOR.

† The 11. and 12. W. 3. c. 20. took away all duties payable by any person by statute or law whatever on the operation of English woollen manufactures. &c. &c. 1.—EDITOR.

‡ Such as are curious to go further into the subject of the duties upon clothes exported, may be fully gratified by consulting those two most celebrated histories of Mr. Smith's *Memoirs of Wool*, and Mr. Anderson's *Chronological Deduction of the Wool-merchandise*.—EDITOR.

C A P. XXVII.

Concerning the subsidy of alnage.

CONCERNING the inland custome of clothes, which is alnage, shall be my next enquiry.

It is certain, that antiently, especially in the times of H. 2. and the beginning of king John, there was a great quantity of woollen cloth made in England. This appears, 1. By many guilds and fraternities of weavers erected in most of the considerable towns and cities in England with large privileges, and that answered good fee-farm rents to the crown. 2. By the antient assises sett for the length and breadth of woollen clothes, whereof hereafter.

It is likewise true, that in the long civil wars, especially the time of H. 3. the manufacture was almost lost, but recovered again gradually, till the beginning of E. 3. when it arrived to a reasonable condition, for so the records before mentioned touching the imposition upon clothes exported tell us, *magna pars lanæ pannificatur*; and by the statute of 11. E. 3. the importation of foreign clothes was wholly prohibited.

This will be found a necessary precognition to the history of subsidy of alnage intended in this chapter.

I shall therefore consider and examine these three matters, in order to the full discovery of this business:

1. How the case stood antiently and in succeeding time in reference to the length and breadth of cloth; for *ulnagium*, or alnage, or alnager, is a term of relation to the common measure of cloth by the ell or *ulna*.

2. I shall consider how the office of the alnager stood in antient and succeeding times.

3. I shall in the last part consider the subsidy of alnage itself, its growing and progress, and to what it extended.

Touching the measure of cloth,

It appears by Roger Hoveden, fol. 774, that in the time of R. 1. there was a certain assize of the breadth of clothes, viz. *Panni ubique fiant, fiant de eadem latitudine, viz. de duabus intra lissuras, et ejusdem bonitatis in medio et lateribus, sub assis facturæ*. In the time of king John upon the petition of the merchants that assize was repealed. Hoved. 822.

By the great charter 9. H. 3. cap. 25. the former assize for the length of woollen clothes, *tinctorum ruffatorum et baubergettorum, scilicet*

scilicet duæ ulnæ inter lisuras. And accordingly the assize of cloth was proclaimed, *Claus. 22. H. 3. m. 12. dorso custodi Nundinar' Sancti Botolfi.*

But the ensuing troubles in the reign of that king caused much interruption in trade; and besides this assize extended only to the breadth, not the length of clothes.

King E. 1. in the sixth year of his reign makes a new fuller provision for the assize of cloth, and reinforceth a proclamation made by his father in the 56th year of his reign, viz.

1. *Quod quilibet pannus Angliæ, cujus ulna valet quatuordecim pedes et ultra, sit latitudinis 2 ulnarum inter lisuras.*

2. *Alii panni vilioris et minoris pretii sint 7 quarteriarum cundum assisam antiquam.*

3. *Quilibet pannus de partibus transmarinis, qui sit de duobus sedibus, sit longitudinis 26 ulnarum et latitudinis sex quarteriarum inter listas.*

Et quod omnes panni predicti, tam cismarini quam transmarini, qui non sunt longitudinis et latitudinis predicti, be seized into the king's hand, exceptis assais partium transmarinarum Scotiae et Hiberniæ, de quibus certa mensura non habetur.

This is entered upon the parliament roll of 25. E. 3. n. 44. But yet it seems this did not limit any length to English clothes.

By the statute of Northampton 2. E. 3. cap. 14. all cloth put to land shall be of the measure following, to be measured by the king's aulnager, under pain of forfeiture, viz. every cloth of ray 28 yards long, 6 quarters broad; every coloured cloth 26 yards long, and 26 quarters and a half broad.

But this extended only to foreign clothes imported.

By the statute of 25. E. 3. cap. 1. the same assises are laid upon all clothes found with any merchant under pain of forfeiture; and the king's aulnager to measure them.

Rot. Parl. 25. E. 3. n. 44. a repeal of that statute is made. All that it obtained was an act, that the aulnager should measure whole clothes.

Then ensued the statute of 27. E. 3. cap. 4. touching aulnage, whereof properly hereafter.

By the statute of 47. E. 3. cap. 1. clothes of ray to be sold in England, to be 28 yards long, and 6 quarters broad; coloured clothes to be 26 yards long, and 6 quarters at least broad, under pain of forfeiture.

By the statute of 17. R. 2. cap. 2. every man may make cloth of what length and breadth he please, paying his aulnager *pro rata*; but none to put his cloth to sale before measurement.

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king's aulnager. This is after in part repealed by the statute of 5. E. 6. as to the length and breadth of clothe.

by the statute of 7. H. 4. cap. 10. coloured clothes and of ray are to be of the same length and breadth as is appointed by the stat. of 2. E. 3.

by the statute of 11. H. 4. cap. 6. a new seal ordained for aulnager on whole clothes and dozens.

by the statute of 11. H. 6. cap. 9. it is declared, that the cloth in the statutes of 7. and 11. H. 4. are only intended broad cloth and broad dozens; and not of clothes called *es*, which may be 14 yards long and one yard broad, payable the subsidy *pro rata*, and not to be put to sale till measured by the aulnager.

by the statute of 4. E. 4. cap. 1. a measure and seals appointed for half clothes, streits and kerseys.

by the statute of 17. E. 4. cap. 1. alters that way of sealing in respect of the king's loss of his aulnage.

After this there follow several acts of parliament limitting the weight and measure of several clothes of several countries and shires, viz. 34. H. 8. cap. 11. 5. and 6. E. 6. cap. 6. 2. and 3. E. 3. cap. 12. 4. and 5. P. M. cap. 5. 8. Eliz. cap. 7. 27. cap. 17. and lastly, 4. Jac. cap. 2. whereby, among other things, the estimate of the length of a broad cloth is to be 24 yards, and according to that estimate of length the duties to be levied.

And thus stands the measure of clothes according to the several proportions settled by these acts; which is necessary to be known in reference to what follows, because it explains the same and the reasons of it.

The second thing which is to be examined is the aulnager's office, and incidents thereunto*.

By what appears, it is plain there was an officer of aulnage long before the statute of 27. E. 3. when the subsidy of aulnage was first granted. And this appears by the very acts mentioned, which anteceded the statute of 27 E. 3. *Vide Stat. 13. E. 1. m. 2.* the office of alnager over all England. And indeed it had been idle to have settled assizes of aulnage, as is before mentioned, unless some common officer had been appointed to have looked after it, and after the king's foresight for not observing it.

The office therefore of alnage was instituted first and principally in reference to commerce and trade, to see that the buyer was not deceived by the seller; and as the clerk of the market was first appointed to prevent deceits in weights and measures, so the alnager in reference to cloth and in reference to the gathering up his forfeitures in cases of defaults.

* See 4. Inst. 30. 31. and 28^o.—EDITOR.

(2.) To what it extends.—And 1. it is extended only cloth of wooll, and therefore not to canvas and linnen. And therefore when the king H. 4. granted an office of measuring canvas with a certain fee upon every cloth, it was adjudged both in the king's bench and parliament, that the grant was void. *Rot. Parl.* 11. H. 4. n. 49. *Rot. Parl.* 13. H. 4. n. 43. 11. H. 4. B. R. *Rot.* 27. Cook on *Magna Carta*, cap. 30. page 30.—And 2. it did not, neither doth extend to all manufactures of wooll. And therefore it was also, that when the king Edward granted the office of assay and measurage of worsteds, it was repealed as prejudicial to the people, and that repeal affirmed and renewed *Rot. Parl.* 22. E. 3. n. 31.

And the manufactures of wooll, that anciently came under any determinate measure, were not antiently within the alnager's office, till reduced under the same. And some were appointed to be measured as well as to pay the alnager's fees, as freits and kerseys by the statute of 1. R. 3. cap. 8. and other short clothes by the statute of 17. R. 2. cap. 2. Of which he is appointed to take his fees, though he did not measure them, as rugges and Lancashire frizes by the statute of 8. E. 3. cap. 12. And generally at this day the alnager doth not measure broad clothes; for he is inhibited from it by the statute. * and yet by the statute 4. Jac. cap. 2. he is to take his fees wherein a cloth of 24 yards long and 64lb. weight is made the standard and estimate of a broad cloth.

(3.) Touching his fees. They are settled by the statute of 27. E. 3. viz. for a whole cloth an half-penny, for half a cloth a farthing, to be taken of the seller; but for less than half a cloth he was to take nothing. But in ensuing statutes, especially that of 17. R. 2. cap. 2. where every one might measure clothes of what length or breadth they pleased, it seems the alnager's fee was saved, and his office to be exercised, though there were no settled measure for cloth from that time till a long time after. And although at this day the alnager doth not measure some cases may not, measure some sorts of clothes; yet in some cases his rateable fee is saved; and regularly at this day in some cases, where the king may lawfully take his subsidy, the alnager may take his fee limited by the statute of E. 3. Therefore the discussion of the king's duty will illustrate this.

III. Therefore I come to consider the subsidy or duty of alnage.

This duty was first settled by the statute of provision of 27. E. 1. cap. 4. by which act—1. The forfeitures were created to the king for the want of due measure of cloth before that time are pardoned.—2. The office and fee

* See 1. R. 3. c. 8. s. 6.—EDITOR.

the alnager are settled and ascertained.—3. A perpetual duty to the king called the subsidy of alnage was established and settled,

	£.	s.	d.
Of every cloth of assize wherein is no graine	0	0	4
Of every half cloth wherein no graine	0	0	2
Of every cloth of assize of scarlet on whole graine	0	0	6
Of every half such cloth	0	0	3
Of every cloth of assize half graine	0	0	5
Of every half such cloth	0	0	2 ob.

Every half cloth passing the assize by 3 yards to pay as a whole cloth.—Where subsidy is once paid, or for cloth made for a man's own use, nothing more to be paid.—Clothes sold before they are sealed by the alnager to be seized as forfeit wherever they are found.

Upon this act these things are considerable :

1. When this subsidy is due.—And regularly it is not due, when the goods are sold ; for it is to be paid by the seller.

But by the statute of 8. Eliz. cap. 12. the seal and alnager's fee is to be paid when carried out of the county.

2. Of what quantities.—It seems this act extends only to whole clothes and half clothes by the letter of it. But possibly a construction it may be extended to a rateable subsidy for smaller parcells. Yet *quære* ; for there is provision made, that it exceed the half cloth by 3 yards it shall pay for a whole cloth ; which imports, that the makers of the law intended no rateable subsidy for parcells ; for if it had, it would not have made provision in such manner for parcells.

But the statute of 17. R. 2. cap. 2. hereafter mentioned makes sufficient provision in this case for smaller parcells, and also the following acts.

3. Of what kinds of cloth.—The letter of this act extends only to whole and half cloths of assize. But this is remedied by the statute of 17. R. 2. cap. 2. as shall be shewn.

By the statute of 51. E. 1. cap. 7. clothes not fulled are not to be exported, nor pay alnage.

By the statute of 51. E. 3. cap. 8. no subsidy of alnage is to be paid of Irish cloth, nor cloth made of Irish wooll. But the reason seems principally to be in favour of the Irish manufacture, and because it paid before its subsidy or custom upon its exportation from thence.

4. The remedy for the duty is by the forfeiture of the goods sealed ; for now the alnager's seal was not only a testimoniall that the cloth was of due assize, but also that the subsidy of alnage was duly answered ; and this forfeiture extends also by

construction to those other sorts of clothes, which by subsequent acts were brought within this duty.

The second and principall statute concerning the subsidy alnage is that of 17. R. 2. cap. 2. whereby it is enacted, that every man may make and sell cloth, as well kerseys as others, what length and breadth he please, paying the alnage and other subsidies and duties *pro rata*; but none to put to sale any cloth before they be measured and sealed by the king's alnager.

Upon which act these things are plain and observable:

1. That although the assise of the cloth was now in effect wholly taken away, yet the king's duty of alnage continued.

2. That consequently whatever the quantity of the cloth was that was exposed to sale, yet the seller was to pay a subsidy of alnage *pro rata* for it.

3. That the forfeiture enacted by 27. E. 3. doth extend to the alnage due by virtue of this act.

But then the greater question, that hath been moved, has been—(1.) Whether at least by virtue of this statute the new invented draperies, as serges, bayes perpetuanas and hares are liable to pay this subsidy or not.—(2.) If yea, then in what proportion.—And

(1.) It hath been ruled, that they ought to pay this duty which is made evident,

1. By the statute of 17. R. 2. itself, which takes kerseys as well as other cloth to be chargeable with this duty; and kerseys were a new manufacture and not in use at the making of the statute of 27. E. 3. nor mentioned in it, but of clothes of assise.

2. By the statute of 1. H. 4. cap. 19. provision is specially made, the kerseys, Kendal cloth, Coventry frizes, nor any other cloth nor remnant of cloth of England or Wales whereof the dozen exceed not 13s. 4d. pay no subsidy three years; which were new manufactures and needed by this provision, if not liable to alnage. And when Rot. Parl. 9. H. 4. n. 34. a perpetual exemption of them from alnage was desired, it was denied. Only by the statute of 9. H. 4. cap. 1. Kendal clothes, whereof the dozen exceeded not 6s. 8d. were exempted perpetually from alnage. *Vide stat. 7. Jac. cap. 1.*

3. By the statute of 11. H. 6. cap. 9. though cloth called streits are declared not to be cloth within the statute of 7. and 11. H. 4. touching length and breadth of cloth; but any man may sell them at 14 yards long and one yard broad; yet they are to pay the king his alnage

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gratâ. The like appears for streits and kerseys, by comparing the statute of 4. E. 4. cap. 1. and 17. E. 4. cap. 5.

4. By the statute of 8. Eliz. cap. 12. Lancashire cottons, frizes and rugges, though a new kind of manufacture, are chargeable with alnage and the alnager's fee.

5. Accordingly certified by the opinion of all the judges P. 2. *Jac.* and so recited by Cook on *Magna Carta*, page 62.

6. And accordingly resolved by the barons of the exchequer after several arguments . Car. 2. *Rex versus Samfson* upon an information for Colchester bayes fold, and the alnage not paid, and judgment *pro rege* that the bays were forfeit *.

But there was no opinion given by the court touching Norwich stuffs made of worsted, wherein the judges in 2. Jac. seemed rather to be of opinion, that the alnage was not due for them ; first, because of the inconveniency in opening these stuffs ; and secondly, because never taken of these stuffs.

I shall only add some observables more in confirmation of that opinion touching the exemption of Norwich stuffs from alnage.

1. They were never under the office of the alnager, nor subject to be measured by the king's officer ; and when it hath been attempted, the patents have been repealed. *Vide Rot. Parl.* 22. E. 3. n. 31. *Rot. Parl.* 11. H. 4. n. 38. And since the alnager's seal was the only, or at least chief evidence of the payment of the subsidy, it is not likely, that any such stuffs should be chargeable with the duty that were not liable to the alnager's office.

2. By special acts of parliament, namely E. 4. † the regulation, search, and examination of Norwich stuffs, their goodnefs and measure, is put under another government. And hence it is, that, although most of the new manufactures of wooll, are mentioned and regulated for their length and breadth, in some of these several acts of parliament before-mentioned ; yet I remember no mention in any of them, of Norwich stuffs or worsteds.

3. Somewhat may be considerable likewise in the manufacture itself, which differs from others ; for there is not only a difference in the spinning and weaving, but even in the wooll itself, which is in a manner a manufacture in it's very preparation before it be otherwise used.

The case here cited was adjudged in Mich. 13. Cha. 2. and is reported in Hardr. —EDITOR.

See 20. H. 6. c. 10. 23. H. 6. c. 3. 7. E. 4. c. 2.—EDITOR.

It is true there have been contests about it in the court of exchequer, as also about dornix, linsley-wolsey, and knitt stockings, and informations directed and preparatives to it, by depositing of the duty; but never that I find resolved, nor peaceably enjoyed. *Vide inter decreta scaccarii* 3. Jac. 4. Jac. 6. Car. the prosecution of the duke of Lenox.

But for other new draperies there seem to be settled resolutions, or at least opinions, of that court, that they ought to pay alnage. In *M. 3. 4. Eliz. Rot.* 191. *Mich.* 32. 33. *Eliz. R.* 321. *M. 39. Eliz. lib. Decretor* 262. Hall and Greathed there are decrees directing and ordering the payment of alnage for new draperies; but none of these speak of Norwich stuffs.

(2.) Touching the proportion that they are to pay, it may have a double respect.

1. To the quantity.—And the rule or measure seems to be this. By the stat. of 4. Jac. before-mentioned, a whole cloth is estimated at 24 yards and 64lb. and according to that estimate it pays it's alnage for a whole cloth, and in that proportion for part of a cloth. The proportion of alnage for cloth of assise without grain by the statute of 27. E. 3. *lib. c. 4.* is 4d. If therefore a pack of bayes weighs 64lb. shall pay it's alnage for a cloth of assise, viz. 4d. and so *pro rata*.

2. To the quality.—As by the statute of 27. E. 3. there are several rates of alnage for cloth without grain, half grain, and whole grain, so the rates will be accordingly diversified for stuffs, allowing as before 64lb. to be the weight of a whole cloth. And it hath been taken as to cochineal, that though a materiall for dying lately found, yet a cloth dyed with it shall be said in grain.

There remains this only enquiry, which I shall add to conclude this business.—Why was not the invention of Micholson, for pretermitted customes to be taken in cloth, proportionable to the subsidy and custome of woolls, as justifiable, as this the rate of alnage upon new manufactures in proportion to the old; and how came it to pass, that the same judges, that condemned this as an unlawful imposition, justify this as lawful? *C. M. Cal.* 60. 61.

I answer, the difference is this. In the former case, the subsidy and custom lay upon the bare material, viz. the wooll; and therefore the translating it upon wooll when manufactured into cloth

as to transfer it upon another kind. But alnage in its first institution was sett upon cloth, and the new invention of draperys but a new species of the same gerins; and both the new and the old agree in the common denomination of cloth; and if it could be otherwise, any little diversification of a manufacture would render it another thing, and so deprive the king of what was intended him*.

C A P. XXVIII.

concerning things taken upon the sea, and letters of marque and reprizall.

SHALL conclude the whole discourse with something, that hath a cognation with maritime business; which, though it be not altogether proper to the business of customs, yet it may be worth the knowing, at least in relation to the business of trade,

I. Touching prizes or taking of goods upon the sea in times of hostility.

II. Touching marque and reprizall upon injuries done in times of truce or peace.

I. Touching the former of these, viz. things or persons taken in times of hostility, wherein these things will be inquirable.

(1.) What shall be said hostility†.

That is a time of hostility, when war is proclaimed by the king against a foreign prince or state. This and this only renders them enemies.

If there be warr between two princes upon the seas, and mutual fighting, as between us and the Hollanders at this day; although as between the sovereigns it is in many respects a time of hostility, and therefore each doth take and confiscate the goods of the other; yet to many purposes it is not a time of hostility, especially in relation to the subjects of either side.

1. There is in such case no universal confiscation *ipso facto*, without an expresse mandate, of the goods found of either in the other's territory.

2. The receiving of subjects of the foreign prince or state is not *ipso facto* high treason, without some assistance given them in order to the warr.

3. The subjects of either side may not take the goods of the other without commission, which is usually granted by the lord

* Since Lord Hale's time the subsidy or duty of alnage has been wholly taken away. 11. and 12. W. 3. c. 20. f. 2.—EDITOR.

† See on this subject 1. Hal. Hist. Pl. C. 160. to 164.—EDITOR.

admiral.

admiral. If he doth assaile the foreigners ships otherwise than in his own defence without such commission, it is a depredation; for it is not a time of absolute hostility, in respect especially of the king's subjects, but qualified, viz. that commissions shall issue of reprisal to them that desire it; and the qualification is commonly in the proclamation that issues upon such occasion, although in truth there is another end of such commission, viz. that the parties employed in such acts of hostility as privateers may be known, and may secure the shares belonging to the king or admiral of goods taken, and may be responsible for any miscarriage at sea under pretence of hostility.

And upon this reason it is, that taking of goods by or from pirates comes not entirely under those laws, that concern *capta per hostes vel ab hostibus*. That which pirates take changes not the property of the true owner, as it doth in case of an enemy; for such a taking is but a spoliation, and not a lawful full caption. 2. R. 3. 2 stat. 27. E. 3. ft. 2. cap. 13.

(2.) The next enquiry is, what effects the taking of the goods of such an enemy hath.

1. Regularly the goods of an enemy, that are found within the king's dominions, do not belong to him that finds them, unless they be taken by him *more hostili*; but they belong to the king as *bona inimicorum*, which is a prerogative belonging to the king, and was inquirable as one of the articles of the Eyre, viz. *de cattallis Francorum vel Flandrensis vel aliorum inimicorum domini regis retentis, quia illa habent*.

2. But if the goods of an enemy were taken by force either in a sea-fight or in battle upon the land, regularly by the ancient law the goods became his that took them, viz. as soon as they were brought *intra presidia*, 2. R. 3. 2. And this was to encourage the valour and industry of the soldier. And on the other side, if an enemy take the goods of an Englishman, it changed the property, insomuch that if it were retaken again by another Englishman from the enemy, the property of the first owner was lost, and should not *redire per postliminii* to him by the retaking of it by another. 7. E. 4. 14. 22. E. 3. 16. *per Wilby*. But it should seem by that book and by other records, that if the enemy had not had the goods in his custody by one intire day and night, according to the custom of England, the first man's property were not lost; and therefore that if retaken by another within that time the first owner was to be restored.—*Clause 26. E. 3. m. 22.* The Castellans of Calais seized goods as wreck, which had been taken by a pirate (I suppose it was intended an enemy

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173.*

from an English merchant *non amotis fervientibus dicti mercatoris*. The English merchant prays restitution, *et quia deducto negotio coram admirallo et consilio visum est eis, per legem maritimam bona per piratas capta super mare, quæ in manibus piratorum per unam diem et unam noctem non permanserunt, mercatoribus super custodia earundem restitui debere*: therefore restitution is granted.

3. But although this was the antient law, yet at this day, and indeed antiently, there are several constitutions, that do correct this translation of the property of the goods of enemies to the taker, and to avoid disorder and confusion some qualifications are introduced variously according to various times in case of goods taken by pirates or men of war from enemies. For—1st at this day, even in cases of hostility, private men of war must have a commission from the king or admiral.—2d. There is a distribution made of the goods taken upon the sea by men of war, and in some cases also by merchantmen that take the goods of enemies in their own defence. *Vide in Nigro Libro Admiralitatis, et Claus. 19. E. 2. m. 26. pro Roberto Beudyn*. If a fleet or ship under the king's wages took a prize, the king had a fourth part; the owner of the ship another fourth; the residue was divided among the takers. If the admiral were absent, he was to have due share equal to a common soldier, if present he had two shares *per tatum*. But these proportions have been occasionally varied, and rarely been uniform in all times. *Vid. Rot. Parl. 50. E. 3. n. 81. 5. H. 4. n. 59. 8. H. 4. n. 22. 20. H. 6. n. 30*. At this day the admiral hath the thirds of goods taken by private men of war as his fee, but in right of the king. Proportions of this kind vary as occasions require at the king's pleasure.

4. What shall be said prize.

If an enemy come into the sea with the king's late conduct, his goods taken shall not be prize to the taker; for the late conduct is a kind of personall suspension of the hostility, and accordingly they are privileged from mark and reprisal. *Vide stat. 20. H. 6. cap. 1. and 14. E. 4. c. 4.* whereby those letters of safe conduct ought to be enrolled in chancery, that it may be known to whom granted.

If the goods of an enemy are carried in the ship of a friend and bound for an enemy's country, and the ship is taken by the English, the goods are prize, but not the ship wherein they are taken, nor the other goods in it. *Claus. 47. E. 3. m. 39. pro mercatoribus Hispaniæ et Portugalliæ, Claus. 48. E. 3. m. 24. de vinis conquestis deliberandis*. But otherwise

*See Robin's
Collect. v.
Marit.
no 180.
in the
note, p.
200. in
the note
also.
See J.
Robin's
Admir.
Cap. 208.
note (a) at
the end of the
note, p.
200. in
the note
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otherwise it may be of ammunition for war he shall carry
Claus. 20. E. 3. Par. 1. m. 24. dors.

If the goods of a friend be carried in an enemy's ship, although the ship be taken, the goods of the friend were to be restored, unless they were provisions or ammunition of war. But the law was altered in England by a temporary law made only for three years *Rot. Parl. 14. H. 6. n. 24.* and afterwards made perpetual by *Rot. Parl. 20. H. 6. n. 18. ft. 20. H. 6. cap. 1.* viz. that if any goods are taken by English upon the seas charged in any ship belonging to the king's enemies and having letters of safe conduct enrolled, there be no restitution of the same goods to any person whatsoever friend or enemy.

If war be proclaimed by England against France or other kingdom, the merchants or their goods that are here are not to be seized as goods of enemies, unless our merchants themselves be so used; and that by *Magna Carta, cap. 30. et si sint in terrâ contra nos guerrinâ, et tales invocantur in terrâ nostrâ in principio guerræ, attachientur sine damno corporum suorum rerum, donec sciatur, quo modo mercatores terræ nostræ trahantur in terrâ contra nos guerrinâ; et si nostri salvi sunt ibi, alii salvi sint in terrâ nostrâ**. But if a foreign merchant in enemy mity come hither after the war proclaimed, he hath not the protection.

5. Concerning prisoners taken in warr, and to whom they belong, *Vide Register 102. Claus. 7. E. 3. par. 1. m. 15. dors. Claus. 27. H. 3. par. 1. m. 1.*

* For Lord Hale's further observation on this chapter of *Magna Carta*, see his *Hist. Pl. C. v. 1. p. 95.*—EDITOR.

CONSIDERATIONS

TOUCHING THE

ENDMENT or ALTERATION of LAWEs.

BY

JOHN CHIEF-JUSTICE HALE.

This Treatise is noticed by bishop Burnet in his list of lord Hale's works. The manuscript, from which it is extracted, forms part of a collection of manuscripts by lord Hale in three volumes in folio. These belonged originally to lord chancellor Somers's library, and afterwards to sir Joseph Jekyll, late master of the Rolls, who married one of lord Somers's two sisters and coheirs. Since sir Joseph Jekyll's death, the three volumes came into the hands of his great nephew Joseph Jekyll, esquire, barrister at law; who most obligingly gave the use of them to the editor. By an entry where one of the pieces, it appears, that it was copied in 1750 from the original in lord chief-justice Hale's own handwriting, with the leave of his grandson Matthew Hale of Lincoln's-inn, esquire; and in another, sir Robert Southwell is named as the person to whom the manuscript was lent for that purpose.]

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C O N T E N T S.

1. **C**ONCERNING the several extreams relating to the amendment and alteration of lawes ; and therein touching the extreame in the excesse of over-hastines and forwardnes to alteration in lawes.
2. Touching the reasons and grounds, that ordinarily move men to this excess and itching after changes in in lawes.
3. Touching the other extreame, the over-tenacious holding of lawes, notwithstanding apparent necessity for and safety in the change ; the danger and occasions thereof.
4. Some things necessarily to be premised touching the matter, the manner, the persons, and the season of publick undertaking for a reformation of the lawes.
5. Concerning the particulars, that would be fitly and safely amended, and in what method they shall be prosecuted.
6. Concerning those inconveniencies, that are in the management of the king's revenue, and the remedy thereof.
7. The present inconveniencies relating to courts of justice ; and first touching the county court.
8. Concerning the court of common-pleas, and the inconveniencies that may be rectified therein.

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CONSIDERATIONS

TOUCHING THE

AMENDMENT or ALTERATION of LAWES.

C A P. I.

Concerning the several extreames relating to the amendment and alteration of lawes; and therein touching the extreme in the excesse of overhastines and forwardness to alterations in lawes.

THE business of amendment or alteration of lawes is a choice and tender business, neither wholly to be omitted when the necessity requires, and yet very cautiously and to be undertaken, though the necessity may, or, at least, seem to require it.

And that I may the more evenly guide myself in this discourse, I begin with the consideration of both those extreames, viz.

The error in the excess, the over-busy and hasty and violent attempt in mutation of lawes under pretence of reformation.

II. the error in the defect, a wilfull and over-strict adherence in every particular to the continuance of the lawes in the which we find them, though the reformation of them be never so necessary, safe and easy.

Touching the first of these, the offence or error in the excess: therein I will first consider the dangerousness of this temper to be over facile in the change or alteration of the lawes; then I will examine, upon what reasons or pretences, or infirmities, men are usually carried to this fickleness and looseness in relation to lawes.

Touching the danger and inconvenience of over much hastiness in changing of old lawes, and introducing of new, there be many considerations, that render such dispositions and such alterations very dangerous.

I. Every

1. Every law that is old hath this advantage over any law, in that it is better known already to the people who are concerned in it, than any new law possibly can be without length of time; by means whereof it must needs come to pass that though a new law be possibly as good, and it may be in degree better than the old, yet many great inconveniencies will open in that interval, which will occur between the promulgation of the new law, and the full and perfect knowledge thereof to those who are concerned in that law: and if there were no advantage of the continuance of old lawes above the introduction of new but this, yet it should make people very shy and cautious of changes, and most perfectly to demonstrate, that the advantage of the change would be so great, that it would preponderate over every single consideration, viz. the notoriety of the old and novelty of the new.

2. It is most certain, that time and long experience is more ingenious, subtle and judicious, than all the wisest and acutest wits in the world co-existing can be. It discovers varieties of emergencies and cases, that no man could ever of himself have imagined. It discovers such inconveniencies in the old law, that no man would otherwise have imagined. And on the other side, in every thing that is new, or at least in most things especially relating to lawes, there are thousands of new occurrences and intanglements, and coincidencies, and complications which would not possibly be at first foreseen. And the reason is evident; because lawes concern such multitudes, and those of various dispositions, passions, wits, interests, concerns, that it is not possible for any human foresight to discover at once, and provide expedients against, in the first constitution of a law. Now a law, that hath abidden the test of time, hath met with all sorts of these varieties and complications; and experience hath shown that process of time discovered these complications and emergencies, and so has applied suitable remedies and cures for the various emergencies. So that in truth antient lawes, especially those that have a common concern, are not the issues of the private wisdom of this or that council or senate, but they are the product of the various experiences and applications of the wisest things in the inferior world; to wit, time, which as it discovers day after day new inconveniencies, so it doth successively apply new remedies, and indeed it is a kind of aggregation of the discoveries, and applications of ages and events; so that it is a great advantage to go about to alter it, without very great necessity, and under the greatest demonstration of safety and convenience imaginable.

*G. Litt.
97. 6.*

An overbusy meddling with the alteration of lawes, though under the plausible name and pretence of reformation, doth necessarily introduce a great fluidness, lubricity and unsteadiness in lawes, and renders it upon every little occasion subject to continual fluxes, vicissitudes and mutations. When once this is changed, why may not that which is introduced be changed and so onwards in perpetual motion? So that possibly in the space of an age or two, the law of a kingdom, and with it its government, may have as many shapes as a silkworm hath in the space of a year; so that they that now live, cannot project or understand by what laws their children shall live, nor the child or grandchild by what laws the kingdom was governed in the time of the father or grandfather; and thereby the constitution of the government, the rules of property, and all things that are concerned to have the greatest fixedness that may be, shall become as lax and unstable, as if every age underwent a change from a foreign state. And therefore in all times, the wisest rulers and counsellors have been ever careful to keep the fetters of a kingdom, as steady and fast as might be; and it was, that, not so much to gain observance as firmness to their laws, they were always stiled sacred, and the people introduced into a venerable esteem of them, by a pretence that their laws were given from heaven, and therefore not to be changed by inferior authority.

Overmuch tampering with, and changing of lawes, which is obtained by long use and custome, is commonly very unusual and unacceptable to the people, into whom their ancient laws and customes are twisted and woven as a part of their nature, and introduceth jealousies and suspicions of designs upon them, gives a handle to busy and turbulent spirits, to insinuate unto them the bad consequences that may ensue upon such change, sometimes begets seditious rebellions and tumults, and prepossesses people's minds for distempers. And though possibly at the first changes may be ushered in with plausible pretences and quiet, and possibly please the multitude with wonderful expectations of benefit thereby; yet, when they find themselves disappointed, and possibly some unexpected inconvenience emergeth from the change, then presently the mouths of people are opened to innovation, and the higher their expectation is raised upon the pretence and promise of benefit, the more they are enraged at the though inconsiderable disappointment therein.

And these, and many more weighty considerations, the wisest rulers in all times have been very tender and jealous of changes of

And upon this account, though when William the first king, he introduced here in England many parts of the Norman

Norman customs and laws, yet when things began to settle, they found it not only convenient but necessary to restore unto the people their old laws; especially those that obtained upon account and reverence of Edward the Confessor. And when the time of H. 3. the clergy endeavoured, but in one point that of bastardy, to introduce the ecclesiastical lawes, the people stoutly and resolutely answered, *Nolumus leges anglicas mutari.*

Therefore it is of great importance upon any alteration of the lawes to be sure,

1. That the change be demonstrable to be for the better, such as cannot introduce any considerable inconvenience on the other end of the wallet.

2. That the change, though most clearly for the better, be in foundations or principles, but in such things as may be with the general frame and basis of the government or law.

3. That the changes be gradual, and not too much at once, or at least more than the exigence of things requires.

C A P. II.

Touching the reasons and grounds, that ordinarily move men to this excess, and itching after changes in lawes.

IHAVE in the precedent chapter considered the first reason, and the danger and inconvenience of it. I shall now examine, what are those humours in men, that commonly breed this disease and instability in men in relation to the change of lawes. And upon a due consideration thereof, we shall be able to see what persons, what tempers and dispositions, and what are at least unseasonable and unfit for such proposals; and thereby a prudent jealousy, when we see changes ushered in by such persons or dispositions, or at such seasons or times, that the pretensions may be plausible.

(1.) As the nature of man generally is affected with a fondness for change, so there are some persons and dispositions, that are more fond of it, and rather than want it will have it even in things which are most ordinarily perniciously hurt by it. These are the form of government and ancient municipal lawes. There is a very same itch of novelty and innovation, that carries men from old positions to novelty in garbs and gestures, or to new fashions

lathes, carriages, and new fashions in business in which it is new, the benefit of such a change of what is to be done.

2.) A second reason they in the constitution of the law, which may be to their interest.

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3.) A third reason in lawes, is the nature of a government, viz. a constitution.

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I.

lathes, carries such when they happen to be in place to innovations and new fashions in lawes; a certain restlessness and nauusness in what they have, and a giddy humour after somewhat which is new, and possibly upon no other account but because it is new, or possibly upon some over expectations of the benefit of such change, though they have no full nor perfect notion of what is to be introduced in the place of what they useate.

2.) A second ground of it is possibly some personal mischief, which they in their own particular have received by the present constitution of lawes. For there is in mankind a passionate selfishness, which makes men think, that whatsoever crosseth them in their interest or concern is unjust and fit to be altered. And on this account it will be impossible for any law to be stable; laws are not fitted for persons, but for things; and must of necessity displease or prejudice the interest of one partie. That, which may be preserves the right and property of one man, may must of necessity cross and thwart that which another man takenly thinks or calls his right: and if upon a peevish, discontented humour, every man that is crossed by a law must be crying of alterations, there must be no law at all; for possibly every new law, that such a discontented person would introduce, will one time or other do him mischief; or if it do not, yet may do another man a mischief in his concern, and will as easily justify him in a new innovation as it could the other in the last.

3.) A third ground of precipitate and inconsiderate innovations in lawes, is the want of a due consideration of the true state and nature of all human affairs, especially in that of lawes and government, viz. a conceit of a possibility of framing such laws and constitutions, as might be faultless, and exquisitely accommodate to the concerns of the whole community, and of every member of it. And hence if there once occur any inconvenience in a law, presently away with it, and a new frame or model to be excogitated and introduced, and then all will be well. This is a great error; for it is most certain, that when all the wisdom and prudence and forecass in the world is used, all human laws will still be imperfect. There is no wisdom or counsel but the wisdom and counsel of Almighty God, who hath the knowledge to foresee all possible emergencies, and hath the wisdom to accommodate and fit every thing according to necessity and conveniency; and infinite power to bow and bend every thing to the determination of his own most wise counsel and will. And if it could be supposed that any human ordinance could be perfect and faultless (as possibly some

may be very accurate, as we see in mechanical works); yet it is not possible, that any human law can be perfect and faultless. No. Time itself, that as we have said is wiser than all the existing wits in the world, is not able to foresee a perfect law that will be absolutely faultless. And the reason is apparent; because it concerns the manners of many men, which are so various, uncertain and complicated, both in themselves and the circumstances adhering to them, that they are not possibly to be exactly fitted. We see in the concerns of one man, how various his actions, his passions, his concerns are; how they change every moment; what new circumstances adhere to them to-day that did not yesterday: and if the state of things be so various and complicated in one man, how various, intricate and perplexed will they be with a multitude of men! And if they are various in respect of a multitude of men, how various will they be with a multitude in various successions of ages, and the occurrences or emergencies thereof! And laws are made in relation to the multitudes in such successions, to which it is impossible that they should perfectly be fit and accommodate. If it be squared so that it fit *ut plurimum*, and doth more good, though it possibly *pro hoc et nunc* may do some harm, yet it is a good law. And besides, according to new emergencies, if they are of moment and importance, there may be some new appendications put to it without a total alteration of the law; such alterations, though not so much constitute a new law, as amend the old; so that the law still morally continues the same law, notwithstanding these appendications, as the Argonauts' ship was the same ship at the end of their voyage as it was at the beginning, though there remained little of the old materials but the chine and ribs of it.

And now possibly some may say, that since all human laws are imperfect, and only the counsells and determinations of Almighty God are perfect, why then may we not take a short convenient course, and take in the judicials given by God by the law of Moses, and so avoid that inconvenience of the imperfection of human laws, the positive judicial law of Almighty God being substituted in the place of all other human laws, and all human laws abrogated and exterminated?

To this I say, that most certainly the judicial law given by Moses was the law of God, and consequently a most perfect law according to the use and end for which it was designed; a law of perfect wisdom, as being the production of an infinite wisdom. But yet this must be observed in relation to the perfection of things of this kind. That is in truth perfect, that is perfect in relation to its use and end, *cui nihil deest* that may be

apposite to that end. And if a man be to fit any thing to the use of any other particular thing, and for a certain determinate time, that is said to be perfect, that is perfectly fitted to that use and duration, though it be not fitted to another thing or another duration; for that were a kind of imperfection, because it would be redundant and superfluous.

This being premised, I say,

Although the moral law, or the law of the two tables, were originally universal both in respect of extent and duration, and therefore, the use being of that amplitude, the divine wisdom fitted it according to the use and extent thereof, both in respect of all people and ages; yet the judicial lawes, as likewise the ceremonial, were never in the design of Almighty God intended farther than that people to whom they were given, and longer possibly to that people than the state of that republic endured. It was indeed exactly accommodate to the state of the people to which it was given; and therein the wisdom of God is not only justified, but manifested and exalted; for it was exactly suitable to the end it was designed. But we cannot say it was fitted, or that there was any need it should be fitted for that people; for that was not within the design of Almighty God.

And this indeed is a circumstance that ought to be an incident in the due constitution of all laws, that they should be accommodate to the condition, constitution, and exigence of the people to whom they are given. Consequently, inasmuch as there be things, peculiar and proper to the state and condition of the people, that are not common to the state of another, nay of the same people at another time; hence it is scarce possible to make one judicial law for all people; or if it were possible, it were not prudent, because inconvenient. Let any man consider the judicials given to the Hebrews; he will find them in a special manner accommodated and attuned to the state of that people, which would not be apposite to the state of another people; as some of their judicials, that referred to the distribution of their possessions, to their discrimination from the rest of mankind, to the redemption of their possessions, and keeping them within their tribes, to their late state of captivity amongst the Egyptians, and the extermination of their practices used in Egypt. And divers other particular reasons, purely concerning that state and unapplicable to another; were the most wise and solid foundations of divers of their laws. But yet these judicials, were given to them that were not upon an appropriate manner delivered to them, and that are consistent with the frame and constitutions of other nations, have been as far as may be described into, as it were, the judicials of other people, as

least since the Christian religion obtained, as the laws touch the degrees of marriage, touching murder, and other things.

2. But yet farther it is to be observed, that even in that people, although the text of the judicial law was that which was the basis and rule of their government and policy, yet the wisdom of Almighty God, even in the very giving of that law, divers times after upon variety of emergencies, instituted a law for the accommodation of things in the same state, according to the exigence of things and emergencies, viz. the great counsel of that people their Sanhedrim, and the governors of that people their kings, which were authorized by Almighty God, according to the exigence of things required, in the civil or political administration, though not to change the judicials given by God by the hand of Moses, yet to discriminate, supply, and provide for the cases and emergencies. So that Almighty God in his infinite wisdom did find, that there was a necessity of supplementals in his own state, according as succession of time and various emergencies might occur, and even during the continuance of that policy or republick.

3. Upon the whole therefore, I conclude, that that law was contrived with most perfect wisdom for that people, and during that state; and therein consisted in a great measure the wisdom in that accommodation. But to translate that law to another people, to whom it was not accommodate, were a wrong to the wisdom. It is most certain, the specificall natural law that is given to birds, is most wisely accommodate to them by the wisdom of God. But for any man to say, because it is a most wise law, therefore it were fit to be used by beasts or fishes, were to dishonour and wrong the divine wisdom, by misapplying it to such a case, and such animals, for whom it was never intended to be a law or law. And though the specificall nature of Jews and Gentiles, and all nations be the same, yet it is certain, that there were, and ever will be, great variety in the states, dispositions, and concerns of several people; so that that law, which was contrived to be a most wise, apt, and suitable constitution to one people, would be utterly improper and inconvenient for another.

(4.) A fourth ground of, or rather temptation to, a premature alteration of lawes already made, is the ignorance of the lawes that are so intended to be altered, in these that are for such alteration; and this ignorance of the lawes, provokes a alteration upon these occasions.

1. It irritates and provokes men to be angry, against that law, which they do not know, nor possibly cannot, without the expence of much pains and time as men are not willing to spare for the ac-

that knowledge. And this temptation commonly befalls men of parts and advanced reason, or such as think themselves so, therefore are impatient of and angry with that they do not know. They think the lawes are foolish; because if they were reasonable things, they must understand them without study, as they do the force of an argument, or the fallacy or strength of a syllogism or a mathematical demonstration, or other: and they think their reason is much undervalued, if it be told them, the law is thus, and the law is thus; and they are presently apt to think they understand reason, and blame the law, because they do not understand it not, when they think it is below them to be ignorant of any thing. And upon this account they will become despisers of the law, and Lycurgi, and legislators, and frame a law, that they themselves may know and approve, because they make it; as the Israelites in the wilderness they would have Gods law, as they may see, that may go before them. And this is a piece of pride, peevishness and inconsiderateness, yet as the pregnant wits of the late times, and indeed of most times, labour under; for it is apparent that things, that are established by statute, though framed with the greatest wisdom, cannot be altered by the light of reason till they are first learned and studied; and if those men should compile a body of laws according to their own fancies or judgment, they possibly might understand them that make them, but others cannot till they have learned and learned them, though they be never so much masters of reason.

Ignorance of the law prompts men to a readiness and forwardness to alter it; because they have not a full comprehension, whereby many times conceive that to be a defect in the law, which is not so, but only in the ministers or officers that ministerially or ministerially exercise or execute it; and they take for an error in the law, which is only a defect or excess in the administration or execution of it.

Again, possibly they may espy something that may in truth be mischievous in some particular case, but weigh not how many inconveniencies are on the other side prevented or remedied by that which is the supposed vicious strictness of the law, and he that purchases a reformation of a law, with the introduction of greater inconveniencies by the amotion of a law, makes an ill bargain. As I have before said, no human law can be absolutely perfect. It is sufficient, that it be not *plurimum*; and as to the mischiefs that it occasions, as they are accidental and casual, so they may be oftentimes by themselves prevented without an alteration of the main.

And besides this, there is that contignation, as I may say, of laws with others, that it may be of great importance, that men over-hastily and unwarily go to make an alteration in that

that which they conceive amiss in a small matter, they endanger a great part of the main fabrick. As he that will every small matter be altering of his house, as he will ever meddling and never be at rest, so he may before he is at rest endanger the whole fabrick, while out of an over-curious nicety he is impatient of every little defect. The best crisis of any alteration is this, that though it may procure some inconveniences yet if it produce an equal convenience, or an inconvenience but probably, yea or disputably, greater or equal to what it remedies, such an attempt is without more ado to be rejected. Therefore if in any thing a full comprehension and circumspection of all things that are or that may be is requisite in any alteration it is an alteration in the lawes. As the philosopher tells us, *ad pauca respicit facile pronunciat*. They, that are but busy in business of the law, are more ready with speed and peremptoriness to pronounce for its alteration, than they are to look about them and see their whole business before them.

(5.) A fifth occasion or temptation to be changing of lawes is somewhat a kin to the former, viz. an over-weening esteem and valuation, that a man many times hath of some party new expedient, that his own fancy or the fancy of others hath suggested for the reformation of something perchance least seemingly amiss in the law, without a due deep attention and consideration of what inconveniences would attend such substitution. Indeed oftentimes men are in love with the production of their own heads; and as they have not the patience or impartiality to examine it, so they are not willing to hear of any thing that might interrupt the pleasure of their fancy, or contradict or disparage it, tho' upon never so clear and pregnant a reason and evidence. And by this means men, having their minds fixed upon what they would be at in this kind, seldom discover the inconveniences till they feel them; like boys, that blow a bubble out of a walnut-shell, which when it is up, run after it with their eyes fixed only upon their bubble, and never consider the ditches they fall into or what breaches they run into in their pursuit, till they feel the damage which they had not provided for or patience to foresee. The truth is, if upon the discovery of some inconvenience in lawes the business were only to provide a plaister for that sore, the reformation of any law were very easy. But the great business of a reformer is, not only to see that the remedy be apposite, but that it doth not introduce some considerable inconvenience, or at least with the inconvenience that it remedies takes not away some other considerable convenience, which the former constitution before the alteration brought with it. For as I before said, the estimate that is

de, is to be made not upon those single inconveniencies that remedied, but upon the whole account of profit and loss, upon the whole cargo, not upon this or that particular commodity ; for we must remember, that the wisdom and prudence of a long time and experience hath made a kind of aggregation and signation in the fabrick of lawes. One piece is for the most part subservient unto and mortised in another, as the frame of a ship or house is, at least when principals are concerned. And before there must be a great knowledge and a vast circum- sion in every considerable alteration of the law.

6.) A sixth occasion or temptation to alter the law are certain passions in men ; and because they are of several kinds, but yet all reducible to the same head, I shall enumerate the most considerable, and so conclude this chapter.

Vain glory.—Men are fond to be enrolled in the number of legislators with Solon, Lycurgus, Numa, and others ; and would be tampering upon that account to get a name.

Ambition.—Commonly the first step of ambitious men ; one of the most popular and taking to lift themselves up to place and power, is with Absalom to be reforming the constitution or administration of the lawes.

Fear.—When men have achieved great power by usurpation or other undue means, the first thing they ordinarily attempt is reformation of lawes ; partly *ad faciendum populum* ; to remove such lawes as sit too hard and uneasy upon their oppressed power ; but principally to engage the generality of men in the acting under new lawes, and holding their interest in properties under them, and thereby they may be engaged to common defence against the true and just power, lest upon a turn of things into their ancient channel the repeal of such laws and interests derived under such lawes may ensue.

Envy and malice at the professors and profession of the law ; that upon these accounts, upon the account of their wealth, power, number, wisdom, and the necessary use of them. Men are those either they fear, or that have a great advantage either of esteem for wisdom and knowledge above themselves : and very envy at the professors many times discover itself against law they profess, in contriving new systems and modell to put their hands out that they think at present in : though this attempt commonly succeeds to the authors with the like disadvantage, as the conspiracy of the limbs against the stomach ; which weaken and sometimes destroy themselves in the attempt.

C A P. III.

*Touching the other extream, the over tenacious holding
lawes, notwithstanding apparent necessity for and
in the change ; the danger and occasions thereof.*

BY what hath been said in the two preceding chapters, a
would suppose, that all alterations, amendments, or re-
formations, of municipal lawes, were wholly to be interdicted
and no room left for it with safety or prudence ; but what
has been once settled for law must stand everlastingly without
reformation or alteration ; and that men were better to live
under the inconveniencies of an old law, than undergo that hard-
ship and inconvenience, which may incur by any amendment
or superinduction of any new lawes.

And accordingly many wise and excellent men have laboured
and still do labour under this extream ; and the motives, reasons
or temptations to this extream seem to be such as these :

1. By long use and custom men, especially that are aged
have been long educated in the profession and practice of
law, contract a kind of superstitious veneration of it beyond
what is just and reasonable. And it happens to them as it
to the Romanists in point of religion, in relation to ancient
rites and ceremonies transmitted to them from their ancestors,
though they become overburthensome by their multitude
ridiculous by their vanity or impertinency, or antiquated
the alteration of the ends and uses for which they were at
first instituted or introduced, yet they are zealously retained, to
the apparent detriment and oppression of religion itself.
Accordingly it happens to these men in point of lawes. They
tenaciously and rigorously maintain these very forms and
proceedings and practices, which, tho' possibly at first they
were seasonable and useful, yet by the very change of matters
become not only useless and impertinent, but burthensome,
inconvenient and prejudicial to the common justice and
common good of mankind ; not considering the forms and
scripts of lawes were not introduced for their own sakes, but
for the use of public justice ; and therefore, when they become
ridiculous, useless, impertinent, and possibly derogatory to the
public they may and must be removed.

2. An over-jealous fear, that it may be possible, that
an unthought-of inconvenience may emerge, which may introduce
some unexpected mischief to the community, and with it a
rage

ement to the judgment of those that are undertakers in it. And this lion in the way choaks all industrious application to most necessary business. Indeed this very fear must make men have to do in this important affair the more considerate and circumspect, the more advising and deliberating, the more solicitous and careful, and the more mature and to take the longer time in their resolute, but must not wholly obstruct the work it, when the public necessity and good calls for it.

A timorousness to displease and disoblige great officers and ministers of justice, especially such as have paid dear for places of this nature (one of the greatest banes to justice and necessary reformation); for it must needs follow upon a due reformation what is amiss, that some offices must be laid aside as needless, others pared from their redundancy. And it is true, those that are concerned in point of interest in such reformation, will be rightfully watchful to see if any thing of inconvenience may arise upon such alterations; and they will be ready to inculcate it with disadvantage enough to such as shall be instrumental therein. And if they find the least imaginable default (as it is possible but some such thing may even) they will industriously multiply and aggravate it beyond the bounds of truth or prudence. It is a little petty revenge they please themselves withall. I shall not need to decry such a pitiful pusillanimity or narrowness of mind, that will neglect a publick important good, either because it may create some advantage to themselves in point of profit, or to those who hold places of advantage in offices of justice or relating thereunto.

A jealousy, lest any thing offered for the amendment of the law is amiss in the law may give a handle to others to ravel the whole frame of it, and to be tampering with it to the great detriment; and so that which is intended to perfect and amend the law shall be used like a little wedge put into a great piece of timber, which shall give opportunity to violent persons to pry greater after them, and cleave the whole in pieces.

And indeed this often falls out in great assemblies, especially when they are not very sedate when any thing of this nature is offered. Perchance one grafts upon it some thing else, and a second thing, and a third a third; whereby the sole defect at first is lost, and something, or it may be many things, are added, pernicious both to the law and government. But this may be with care and vigilance prevented, especially as our legislative constitution is established. There be several halts and stops before a law of this nature be perfected, whereby at any of such an inundation, if it should happen, may be obstructed

structed; and that which is good and necessary be carried on, I shall have occasion to mention hereafter.

5. Exemplary miscarriages, in the late times, of such have undertaken reformation both in matters civil and ecclesiastical, hath brought a disrepute upon the undertaking of any reformation in either: so that the very name of reformation and a reformer begins to be a stile or name of contempt and obloquy, so that men are as fearfull to be under the imputation of a reformer of the law, as they would be of the name of knave or hypocrite.

And upon these and the like accounts it fares with the law, the sages thereof as to the point of reformation of the law, it did with the present age and the *virtuosi* of Parnassus in Babilone. They dare not meddle with it, but let it live as long as well as it can in the state they find it. Only to save the credits upon such occasions, they meddle with some little inconsiderable things, as they set the price upon turnips and cabbages; but nothing is dared to be done of use and importance.

But notwithstanding all these difficulties and obstructions, think good and wise men may and ought to make some private essay even in this great business, and with very good success both to their own reputation and the publick benefit. And in order to the encouragement therein, I shall propound these considerations:

1. We are not without excellent and happy examples of reformation in this kind to the general good and advantage of mankind; yea, and for the very preservation of the lawes themselves, which without due husbandry of them will die of themselves, like trees that want pruning.

The Roman empire was not only signal for its amplitude, power, wisdom, and success, but in a special manner for its lawes. Yet in the proceed of 1300 years they grew so perplexed, voluminous and intricate, that there was a necessity of a reformation of them. The business was undertaken by Justinian emperor, and committed to about twenty excellent counsellors and lawyers, Trebonianus being the chief of that council. There were then extant above two thousand volumes of law, and above thirty hundred thousand paragraphs in verses and among those divers contradictory lawes, very many touching one and the same thing, very many laws obsolete out of use and practice. All these laws were revised, corrected and amended by those noble lawyers, and so much as was reduced into those three volumes which we now call *Corpus Civilis*, viz. the Institutes, Digest, and Code or book of Statutes, and this done in the space of three years, as appears by the narrative of this business in the code *sub titulo de veteri jure canonico*.

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worth any man's reading. Somewhat of the like nature done by Gratian in his *Decretum*, by Innocent in his Decree, and by *Sextus** and the Extravagants in the cannon law. But we shall not need, nor is it indeed pertinent, to bring in foreign examples. Our own country affords us most apt instances. Edward the first, a most wise, powerful and valiant prince, our English Justinian, did make as many, and as great and as happy alterations and reformation of lawes, as might be. If we look into Wales, he took a strict examination of all the laws of that country after he had subdued it, especially those of Howell-Dha, great British Lycurgus; and he made a most excellent alteration and amendment of the whole system of their law, as appears by the statute of Ruthland 12. Ed. I. And concerning the reformation of the English lawes, let any man but read the statutes of Edward the first, he will find as great, yet as happy, alterations, as almost can be imagined. Let us but take an estimate of some. By the statute of Gloucester he gave an action of waste, where none before; and he fixed the jurisdiction of great courts to 40s. and upwards. By the statute of Westminster the 2d, he altered the nature of fee conditional at common law, which bred a great inconvenience. He settled the proceeding in ward, *quare impedit*, returns, writs of mesne; gave *scire facias* and *elegit* where none before; took away age *in cui in vita*; gave a *quod ei deforceat* where none lay before; took away the effect of a collateral warranty in some cases without assets; gave receipt to the wife and her reversion upon default; took away essoins in many cases; made divers other notable alterations, which turned about a considerable part of the administration of lawes; and by the 24th Edward gave an outlet to supplemental remedies upon new emergencies, *ne contingat, quod curia regis deficiat conquerentibus in iustitia*. Again, he prohibited the alienation of lands in mortmain; made the country liable to answer for robberies committed; prohibited the new creating of tenures; and limited the jurisdiction of ecclesiastical courts, and of the Marshalsea and other courts. And many more acts made a very great alteration in the law, and to very good purpose. In the time of Ed. 3. non-claims upon fines taken away; pleaded in English; fraudulent conveyances remedied; executors and administrators enabled to sue; actions given for executors of goods and administrators; a year and a day given for executors of goods and administrators away in the testator's life-time; and many others. If we go over the many alterations of the law in the time of the immediate kings, and come to H. 7. Then fines with proclamations to bar entails, and so in part to repeal the statute of Westminster the 2d; provisions to charge the lands of *cestui que use* and wardships, statutes, &c.

* The Sixth Book of the Decretals is meant.—EDITOR.

In the time of H. 8. the changes were yet greater than any time after Ed. 1. For first, as to Wales, he new-moded the frame of it's government by the statutes 26. 27. and 34. Again, as to a very great concern, as I may say, the law received a very considerable alteration; the statute *de donis conditionalibus* being abrogated as to the attainder of treason; all uses excepted into possession, estates made to pass by deeds inrolled; and made more clearly effectual to barr entailles; recoveries in many cases invalidated; attornment in many cases rendered needless; discontinuances of lands in right of the wife removed; entry given against descents in many cases; all lands made devisable by will, which were not before but by particular customs; jeofailes and mispleadings rectified; monasteries dissolved.

These and many more considerable alterations of the law made and successfully continued to this day, come we down to the time of queen Elizabeth's lawes for amendment, for the reformation of error upon judgments in the king's bench, against fraudulent conveyances, against bankrupts. These and many more lawes made very great alterations in the law, yet without any such small effect, as the melancholy objectors would suppose, but happy and useful for the public good. And the reason is, because wise men had the management of these great changes; they were not done rashly, nor hastily, nor inconsiderately, but upon due and weighty advice and consideration; and have been practised successfully. The truth is, for these forty years, little hath been done of this kind; the times were tumultuous and not seasonable for it; and indeed there was more need by reason of that intermission and chasma, than what of this kind should be done.

The second consideration is this, as all sublunary things are subject to corruption and putrefaction, to diseases and ruins, even lawes themselves, by long tract of time gather cankers, diseases and excrescences; certain abuses and corruptions grow into the law, as close as the ivy unto the tree, or the rust to iron, and in a little tract of time gain the reputation of a part of the law. So that a great and considerable part of the reformation, that is pleaded for, is not so much of the law, as of abuses and corruptions, and wens and excrescences, delays and formalities and exactions, that do adhere to the law and will in time strangle and stifle it with its close adherence to it. And when these dear and profitable cankers, ulcers, and sores are looked after, presently those that are concerned in the profit thereof, or do not duly distinguish between the law and its abuses and diseases, cry out against destroying the law, and altering of the law, when in truth it

ing of the law from those encroachments or abuses that are upon it or brought into it.

But yet farther, I do not think, that the only things fit to be reformed in the law are the abuses and corruptions of it; but there are some things, that are really and truly parts of the law, necessary to be reformed as the errors or abuses of it.

And we must remember, that lawes were not made for their own sakes, but for the sake of those who were to be guided by them; and though it is true they are and ought to be sacred, yet, they may be or are become unusefull for their end, they must either be amended if it may be, or new lawes be substituted, and the old repealed, so it be done regularly, deliberately, and so far as only as the exigence or convenience justly demands it.—In this respect the saying is true, *salus populi suprema lex esto.*

Lawes become or are unusefull to their end upon two accounts. 1. When in their very constitution and fabrick they are faulty, and unjust, and impossible to be born without a remarkable and common inconvenience. I shall not apply this to the thing in question.—But 2dly, when a law, tho' never good in its first institution, yet by reason of some accidental agencies that do most usually happen in tract of time, either grows obsolete and out of use, or weak and unprofitable to its end, or inconsistent with some new superinduction that time and variety of occasions have introduced. And as this is most clear in our lawes, so in our English lawes we shall find, what was in its first institution and possibly very effectual in its time, is now deserted and antiquated, and utterly unapplicable to the present state of administration in England. Glanville wrote a system of our English law in the time of H. 2. Bracton in the time of H. 3. Britton in the time of E. 1. Let any man read them, and see, whether they can by any means accommodate that administration to the present state of things, or the present regiment or order of things. Nay, if we come to the year-books of the time of E. 3. any man, that knows any thing in this kind, will most certainly say, that it cannot fit us; for where is there now one assise or writ brought, unless where they have no other remedy? where the stream of things have, as it were, left that channell, and taken a new one; and he, that thinks a state can be exactly governed by the same lawes in every kind, as it was two or three hundred years since, may as well imagine, that the cloaths that served him when he was a child should serve him when he is grown to manhood. The matter changeth the custom; the contracts the manners; the dispositions, educations and tempers of men change; the societies change in a long tract of time; and so must their laws in some measure be changed, or they will not be usefull for their

their state and condition. And besides all this, as I before time is the wisest thing under heaven. These very laws which at first seemed the wisest constitution under heaven, some flaws and defects discovered in them by time. As manufactures, mercantile arts, architecture and building, and philosophy itself, receive new advantages and discoveries by time experience; so much more do lawes, which concern the manners and customes of men.

All that, which I contend for in the first and second chapter, is, not to render lawes of men like lawes of nature fixed and alterable, but that it be done with great prudence, advice, and upon a full and clear prospect of the whole business.

4. But yet further, by length of time and continuance laws are so multiplied and grown to that excessive variety, that there is a necessity of reduction of them, or otherwise it is not manageable; as we have before observed touching the Roman law which in a tract of 1300 years grew to 2000 great volumes. the reason is, because this age for the purpose received from last a body of lawes, and they add more and transmit the whole to the next age, and they add to what they had received transmit the whole stock to the next age. Thus as the rolling a snow-ball, it increaseth in bulk in every age, till it be utterly unmanagable. And hence it is, that even in the law of England we have so many varieties of forms of conveyance, feoffment, fines, release, confirmation, grant, attornment, common recovery, deeds, enrolled, &c. because the use continued at several times, every age did retain somewhat of what was before and added somewhat of it's own, and so carried over the whole product to the quotient. And this produceth mistakes. As perchance useth one sort of conveyance, where he should have used another. It breeds uncertainty and contradiction of opinions, and that begets suits and expence. It must necessarily cause ignorance in the professors and profession itself; because the volumes of the law are not easily to be mastered.

5. There be in the law to this day somethings continued which, though possibly of ordinary use or occurrence, yet are mischievous when they come to be used, and would not at all be missed if taken away, and which I shall in the pursuit of particulars evidence to the satisfaction I believe of every knowing, considering and unprejudiced mind.

6. I shall add but this one thing more, that it may justly be feared, that if something considerable for the reformation of the law be not done by knowing and judicious persons, too much may some time or other be done by some, either out of envy at the professors, or mistaken apprehensions or passions.

The amendment of things amiss timely, by knowing, and judicious men that understand their business, may do much good, and prevent very much evil that may otherwise; and when the business is begun by such hands, it is possibly be too late to allay it. And although it be true, that legislative power is established there be many reserves to stop or stop such an inundation, yet we know not how high public necessities of supplies may arise, considering our many undertakings in the kingdom: and it is no new thing to observe very hard and unreasonable terms granted as the price and sale of supplies, when they cannot be had upon easier terms. It will have this plausible pretence, that the judges and they will do nothing to the lawes, and therefore it shall be by other hands. Such a humour would be more easily pre-vented by a wise and seasonable undertaking in this kind, which not be so easily diverted or allayed, if once it should be. And thus much shall serve for this chapter.

C A P. IV.

Things necessarily to be premised touching the matter, the manner, the persons, and the season of public undertaking, and a reformation of the lawes.

ON what hath been said in precedent chapters, it seems apparent, that, as on the one side some things may be fit to be done in relation to the amendment of the lawes, yet on the other side it is necessary, that exceeding caution be used as well touching the matter, as the manner how, and the persons by whom, and the season wherein such a reformation may be made. There are two extremes before observed; and he, that can find a course herein between them both, hath attained the mark; only with this caution, that if there must be an error, it be rather in the defect than in the excess. We know already the worst of what is. We know not the worst of what may be done. And therefore, before I come to particulars, I will give some general cautions in reference to the matter, manner, persons, and time or season of such an undertaking.

I. For

I. For the matter, that may or may not bear an amendment or alteration, these things must be observed.

(1.) That nothing tend to the alteration of the government by any measure; for that were to introduce ruin and confusion in reformation; as late and sad experience hath abundantly denoted.

(2.) That nothing be altered that is a foundation or part integral of the law; for these are very sound, and ought not to be touched, lest the whole fabrick should be endangered. We do herein, as a wise builder doth with an house that hath many inconveniences or is under some decayes. Possibly here or there a door or a window may be altered, or a partition made; so long as the foundations or principals of the house be sound, must not be tampered with. The inconveniences in the law of such a nature, as may be easily remedied without undoing the frame itself; and such amendments, though they seem small and inconsiderable, will render the whole fabrick much safer and useful. But of the particulars in their season.

II. Touching the manner and persons, these things are to be observed.

(1.) That it be done deliberately and leisurely. An attentive consideration will every day ripen the judgement of those that shall be employed in such a service farther than they can at first imagine.

(2.) Let every point be fully debated and impartially considered, before it fix into a resolution.

(2.) What can be done by the power and authority of the king and judges, without troubling a parliament for such things, truly this would go a very great way in the reformation of amiss in the law, and such as are of this nature shall be ordered in the particulars hereafter mentioned. For sometimes it comes out, that an unnecessary application to parliament, in things that are otherwise curable, breeds unexpected inconveniences. the poet saith of miracles I may say in this case:

*Nec Deus interfit, nisi dignus vindice nodus
Inciderit.*

(4.) In these remedies, that are given by parliament, let every particular, and as little left *arbitrio judicis* as may be. Upon a remission, forward men will do too much when much is left to their power; but wise and cautious men will do too little. A remedy therefore will be hurtful, not useful. But wise and prudent men desire to understand their rule; though some things of such a nature, as must in the particular application or execution be left to the judges and officers of courts, as the forming and settling of writs, process, pleadings, and other proceedings, for the conformity and subservience of what is to be settled by parliament in this behalf.

5.) Let no laws of this nature have a retrospect; but let time that they shall be put in execution, have such a prospect, as men may not be surprized by the change of things, but be fitted and prepared for and constant of it.

6.) In the preparing and passing of these laws, I would these methods were observed, viz.—1. That it would please the king, with the advice of both houses of parliament, to require the judges and other sages of the law to prepare bills, that be fit for the reformation of the law against the next session.

For as I would not have any man intermeddle in so great business without a most authentic injunction by the king and supreme council, lest he should come under the prejudice of a busy body or an undertaker; so on the other side, I think, persons are so fit to be employed in the first digestion of such business, but such as know what best belongs unto it, and far may be gone with safety and convenience: and as it is an unworthy thing, especially in a judge, to prefer his interest or profit, or the interest of the courts or officers of courts, above the public benefit, so it were an unworthy thing to suspect such a business in those, who are interested with lives, liberties and estates of the people in their judicial emoluments.

2. Such bills so prepared should be presented to the house of commons in the first place; because they represent in a special manner the common interest of the people.

3. In such bills are twice read and committed, and have been or twice particularly debated at the committee, it may be fit to call the judges to a solemn debate at the committee of the house of commons, where they may give the reasons, why they go so far, and why no further; and that their opinion be touching any alterations or amendments offered, and the reasons in relation thereunto; for it many times falls out, that a very good and profitable bill is suddenly spoiled with a word added or a word expunged, which would be prevented, if the members of the bill were first heard to it; and thus many a law is lost, or not retrieved again without many messages and conferences between the houses.

4. When the bill comes to the lords and is twice read and committed, it were fit, that the judges attend the committee for the reasons above given. As thus prepared and hammered would have fewer flaws, and necessity of supplemental or explanatory laws, than hath many times happened.

And thus I have at once absolved the generals, that relate to the manner of the reformation and persons by whom.

Touching the time or season for such a business, it must be observed, that it is not every parliament that is fit for such a business.

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business. When either the times are turbulent or busy, when other occasions of state are many, great or important, it is not a season for such an undertaking; for it is not possible among such hurries of business, there can be that attendance upon and attention unto a business of this nature, as in truth requires. It must be in such a time, when there is great tranquillity at home and little engagement abroad, that the parliament may resolutely, patiently, attentively, and comfortably apply itself to the work. Otherwise it will not be at all done, or not half done, or perchance over done, which is worse than if not done at all.

In the late troubles there was very great earnestness, by those who had gotten the power in their hands, for the reformation of things amiss in the law. And I do verily believe, that such a thing might have been passed in that kind, that prudent and knowing men would have offered. Nay, possibly there scarce any thing, that could have been offered introduction of any alteration, but would have been greedily swallowed. And that, which wise and honest men do now desire, they did not industriously decline; and they did rather chuse to oblige the propofal, or the passing of those things, which possibly the matter of them might be good and useful, than any to promote or advance them. And the reasons were principally these: 1. Because the state and constitution of the government was then fixed upon a tottering and unwarrantable basis; so that any lawes, that according to the mode of former times were passed, would be but snares to mens actions, estates, and involve the generality of men and their estates and properties in a very dangerous condition, if ever things were turned to their right constitution. And we very easily see the difficulty of settling former things upon the king's return, which would have been infinitely more difficult, if the ordinary method of administration of courts rules and lawes, touching estates and properties, had undergone that alteration which was desired by those that were then in power. 2. Because it was evident, that there would have been no one thing so obstructive to the king's return than such a course; for in a sudden, all mens properties, estates and assurances would much rested upon such new lawes, and have engaged the community upon an account of their common interest to support that power which introduced those lawes, which they were so much concerned. And the truth was, this was the great reason, the mystery, why reformation of the law was so much desired by those then in power; and on the other side, as industriously and warily declined and shifted off by many good and knowing men that were respected in

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The things desired were many of them for the matter; but the end and design and the state and condition of things would not allow of such an undertaking. And therefore those, that were solicited to undertake that business, rather to propound such things only to be done, as might be done by the power of courts of justice, but declined whatsoever required a new law to authenticate it. And now things are settled upon their right basis, and the parliament returned to its original constitution, the season for that I know, may be well enough for such an enterprize.

C A P. V.

concerning the particulars, that would be fitly and safely amended, and in what method they shall be prosecuted.

AFTER this large preamble, I shall now descend to particulars that would require reformation; and that I may say the more clearly; and as much as I can avoid omissions of things that are of moment, I shall pursue this method; viz.

I. I shall consider of some inconveniencies in the management of the king's revenue; and the means how to rectify it.

II. I shall consider of the inconveniencies relating to the courts of justice, and the means how to remedy it.*

III. I shall consider the inconveniencies in the multiplicity and inconvenience of suits and actions as the present state of things stand, and the means how to remedy it.

IV. I shall consider the inconveniencies relating to the buying and charging of estates in lands; and the means how to remedy it.

V. I shall consider the inconveniencies in pleas of the crown.

VI. I shall consider the inconveniencies in the present collection of statutes and books of the law, and the means how to remedy it.

Left imperfect. But in part 255.
These four heads wanting.
See note below.

The head appears to have been left imperfect by lord Hale; the only courts of justice of which he discourses, being the county court and the court of common pleas. As to the four following heads, to which his division extends, the manuscript from which this treatise is taken, is wholly deficient. But in the manuscript of lord Hale on the Amendment of the Lawes, which seems to be his first essay on the subject, there is a chapter on the books both of the common law, with a view to the reduction and digest of them.—EDITOR.

As near as I can, I shall pursue this order; and because things remediable will be of a mixed nature, I shall, as I shall through particulars, shew, what are remediable by the power and agreement of the courts themselves what by act of parliament. And in pursuance of these particulars, I shall shew every particular shew, 1. The inconveniencies. 2. The remedy. 3. The debate of the conveniencies or inconveniencies of the remedies propounded.

I shall, as near as I can, hold to this method; though possibly the coincidence of particulars may here and there oblige me to depart from it. And so I proceed to the particulars.

C A P. VI.

Concerning those inconveniencies, that are in the management of the king's revenue, and the remedy thereof.

THE king hath several small rents arising dispersed some out of whole townships, some out of particular lands. They are for the most part known by these names. —1. Vicountiel rents, which arise to a pretty sum, but are excessively lost, because they are but small, and not well known where to be levied. These are under the sheriff's collection and are for the most part within the charge of the pipe. Chantry rents, arising by small sums of 6d. 12d. 2d. &c. of several lands; and these are within the charge of the receiver and auditors, and in respect of their smallness, distance, and uncertainty of the things charged, being rents in gross, rarely parcel of any manor, not yet farm rents, only amounting about 6000l. per annum.

These rents indeed are rather a burthen to the king than profit—1. In respect of the charge of their collection—2. In respect of their obnoxiousness to be lost.

And they are a charge to the people many times five times the rent; for if they chance to be behind, the officer demanding exacts more for the distress than the rent comes unto. Many times the charge of the acquittance or bringing the rent to the audit is more than the rent comes to. As for the vicontiels they are a charge to the sheriff in collecting, one time or other is cast upon the king.

could wish, that these small rents and rents of this nature be exposed to sale and sold*. The king might sell them to the owners of the lands chargeable with them at as good rates as they are worth, or I am sure a better value than they are of when kept.

But I would not have the king's revenue impaired thereby, but the same to be forthwith laid out in purchase of demesnes, which may be set from seven years to seven years at a certain rent.

This rent will every seven years improve and amend, as the land, and the commerce and people increase; whereas quit-rents stand still, whatever improvement fall upon land. And hence it is that those quit-rents, which possibly at the first reformation were a third or fourth part of the value of the lands out of which they were reserved, are not now the fortieth nor the hundredth part thereof. Besides, this could not be lost, as the quit-rents are, and is a more honourable and profitable revenue by much.

I could wish some of the king's parks, forests and chaces to be improved. But then I think, that none of the king's demesnes, nor any of his lands that are not parcel of manors, should not be lett out at small rents, and for lives or long terms of years; but that either they be let at rack rents, or at least at such fines as would consist with a reservation of the full value of the value by the year, and for terms not exceeding twenty years at most. For most plainly the fines that are taken in these cases shrink to nothing, passing through so many hands before it comes into the exchequer; and the king's yearly revenue of his lands is thereby reduced to very little. Whereas the demesnes and the new acquets of the crown, if thus reserved, would arise to a stable, fixed, great, and honourable revenue, and would not be subject to that loss and flux that other revenue is.

Touching lands left by the sea, we find very many and troublesome suits; the subject vexed; that projectors make advantage, and the king bears the undeserved odium of it, and the conclusion gains nothing else by it. And yet it is possible, that vast improvements may be gotten from the sea in success of time, which yet may be encroached by the adjacent owners. I think it may be a just and profitable law, that those that have been in possession of shoars and relict lands for forty

Lord Hale makes a like proposal in the printed treatise by him on Sheriffs Accounts. See p. 108.—The proposal has been executed in part, 1. under the acts which were passed in the reign of Charles 2. to facilitate the sale of fee-farm and other lands of the crown, such as lord Hale refers to; and 2. under an act of the present reign relative to fee-farm and other rents within the survey of the duchy of Lancaster. 2. Cha. 2. c. 6. 22. and 23. Cha. 2. c. 24. and 19. Geo. 3. c. 45.—EDITOR.

years last past, should quietly enjoy them without question; that there should be set up posts and marks round about the kingdom for the discrimination of what is now held from what is to be afterwards acquired, to the end that what lies without the extent of those bounds may unquestionably be the king's, excepting only such salt rivers, where the subject hath by grant or prescription the river, itself and consequently the *fluvialia in communione*.

IV. I think these multitudes of officers, that are employed in the collecting and receiving the king's revenue, must be cuttred. The truth is, their multitude is a burthen both to the king and people; for the fashion hath always unhappily been, that, tho' new officers are made, yet the old are retained, and so the revenue shrinks while the officers swell.

I do not know, but that the whole inland revenue of the crown might be answered with one half and less of the officers that are employed in it; and a great part of it might be answered, as the monthly assessments were, which brought their money roundly, and without the great charge and expense and uncertainty which we find in the ordinary way that is used. And yet upon *supers* retained upon accounts the same process might issue as now.

But to descend yet to more particulars.

(1.) I see not to what use the treasurer's remembrancer nor those several officers that are dependent upon it. The business of that office may with equal ease and greater convenience and certainty be dispatched by the king's remembrancer and his officers; especially if those multitudes of English suits in the exchequer-chamber by English bill were abated, and another hand used for the abridging of those suits to such only, as concern properly the king's revenue, the officers of the courts, those that were really debtors, accomptants or fee farmers of some considerable fee farm; for it is now apparent, that the great business of the king's remembrancer's office are suits in the exchequer-chamber, purely concerning private persons and interests, wherein the king is little or nothing concerned; and upon the fictitious titling of bills as debtors or accomptants where really there is no such thing.

(2.) I see no great use of the several officers relating to tenths and first-fruits. The whole business might be brought into the offices of the auditors of the revenue, and the king's remembrancer, who might make out process in the same manner as the remembrancer of the first-fruits doth; and the auditors of the revenue might take accounts, and the accounts might go in the ordinary track of other accounts in the exchequer.

But if that revenue should continue in that separate manner as now it is, yet there be two things, that would require

any amendment, viz. 1. The receiver to be wholly taken away, as an unnecessary officer, unless it be to keep the king's money for his own benefit; for the receipt may as well be made by the remembrancer. 2. The accounts, especially of tenths, are without any controll. They may well run down the pipe, as other accounts do.

3.) There is a great defect in the tedious method of the shees and receivers accounts; for they keep the king's money in their hands from the time of their receipt till their accounts are paid, which is many times a year and more after it is received. The revenue shall continue in that way of management, it seems fit, that these accomptants should pay in their money as they receive it, or be charged with interest to the king, after the rate of ten per cent. for the same, from the time of their respective receipts.

4.) The comptroller of the pipe was instituted for a good use, and might be of good use. But as it is now managed, it is an empty piece of formality, and of no advantage. Let it be rectified, or taken away; and the best rectification would be that follows, for that would speedily retrench a multitude of offices.

5.) There are at this day in the exchequer many great officers, that receive the profit and fees of their office, and either do not at all attend it, or know not what belongs to it, but only chance once a term sit with some formality in their gowns, and never put their hands to any business of their offices, nor indeed know not how. For instance the king's remembrancer, receiver and remembrancer of the first-fruits, the usher of the exchequer, the chief marshall of the exchequer, the chamberlains of the exchequer, the chief clerk of the pipe, the comptroller of the pipe, and some of the auditors that I could name. These, and some other nominal officers, are great men, enjoy great pleasures, understand not or attend not to their offices, and dispatch all by deputies; and by this means an unnecessary charge is drawn upon the king and his people, for the chief officer hath the profit, and the deputy he hath some, or else he would not live. If these officers are not necessary, why are they continued? If they are, why should they not be executed at the charge only which accrues from the deputy, and the benefit to the nominal officer that doth nothing be retrenched as a needless charge?

The things that would be convenient in this business, which could possibly remedy it, are—1. To reduce the perquisites of the offices to such a medium, as might be sufficient for them to execute the business; and to pare off that superfluous redundancy, which serves only to maintain an idle grandeur, that sits idle and doth nothing but take the account of their perquisites at the

the terme's end.—2. That all persons, that are to be appointed officers in the exchequer, be personally resident upon their offices and not to perform by deputy; and no office of this kind be granted to be exercised *per deputation*.—3. That all these offices may be granted to men educated and experienced, and not to courtiers or great men.—4. That there be no sale of offices of this nature. I do speak it knowingly. The king loseth sometimes more by any such office that he sells, than the profit amounts to; and it is the dearest gratification of a courtier's servant that can be imagined, and of the greatest detriment to the king, when an office concerning the revenue is made a reward of that man's service that knows not how to use it. It is more profit to the king to bestow a pension to the value of the office to such a person; and when he hath done, to bestow the office freely upon an honest man that knows how to use it. It is true to know, many offices are filled already in this kind; and reversions upon reversions granted; and an act to remedy it for the future only were to make a provision to begin the next age. It is worth a present provision, and an inspection to be made at present, and resumption by act of parliament to remedy it, and allotment of some moderate pensions to those that would be moved upon this account; and I believe the king nor people could be no losers by it.

C A P. VII.

The present inconveniencies relating to courts of justice; first touching the county court.

BY the true and wise constitution of this kingdom, for where the debt or damage amount not to 40s. were not to be determined in the courts of Westminster, unless a title of land came in question; but they were to be determined in the county court, hundred court, or court baron. And this was the ancient law. *Vid. stat. Glocest. 6. E. 1.** At that time money was a considerable sum, 1. in respect of the intrinsic value of the coin, for then 20d. made an ounce of silver, and at that day it is 5s. viz. sixty pence, and upon that single account for six shillings then, ariseth now to six pounds. But 2. that was not all; for, as I may say, money was at that time dearer than

* See chap. 8. of the statute.—EDITOR.

is now, because there was not so much. And hence it is, that the prices of all things at this day, are much dearer now than they were then; because money is much more plenty now than it was then, as it will appear to any that looks into the proclamations of prices and commodities, both in the beginnings of our kings and parliaments in the times of E. 1. and E. 2. *Vide Rot. Parl. E. 2. n. 29. in schedulâ*, a proclamation for the price of several things, viz. a fat ox fatted with corn, 24s.—a fat cow, 12s.—a fat hog, 40d.—a fat mutton unshorn, 20d.—a fat mutton shorn, 14d.—a fat hen, 1d.—24 eggs, 1d. which evidences a great advance of the price of things at this day, besides the advance of the extrinsecal denomination of money.

By this, that hath been said, it is apparent, 1. That it was the wise constitution of the common law, to keep small suites from the great courts at Westminster. 2. That if an equal proportion in the denomination of small suites were held, that if suits were the lowest measure of the suites to be commenced in these great courts, at least ten pounds would be the lowest measure at this day.

And yet it is very apparent to any man that converseth with business, that, divide the suits that come down to the assizes to be tried at the great courts, near one half thereof are under 40s. at least in some counties, besides those many, that are ended upon process serving and before they come to tryall.

And yet there is not one of those suites brought to triall, but this day stands each of the parties in at least 10*l.* but if it pass either, there is an allowance that recovers four times as much more, as the principal amounts to, viz. at least eight pounds.

And by this means, 1st. Suites are multiplied. 2. Expences and charges are multiplied. 3. Attornies and solicitors multiplied.

There have been several attempts in parliament to remedy this, viz. the statute of 43. Eliz. cap. 6. 21. Jac. cap. 16. But they have proved ineffectual, partly by the mutual connivance of attornies and practicers, to decline the benefit of these statutes, because it would abridge their employment and profit; partly by the influence of officers upon the practicers in the several courts, by that means their offices should decay; but principally, because, as the present constitution of the county courts and hundred courts stands, it were a kind of extremity to put these statutes fully into execution; for it were to drive men from the courts of Westminster, for small matters where they may have recourse, unto inferior jurisdictions, where as they are at present constituted, they are like to have little or none.

The

The first business, therefore, would be to rectify inferior jurisdictions; and then we may with probable safety and advantage abridge the courts of Westminster from these trivial and inconsiderable suites, where the ordinary costs, that are given to the party that recovers, exceed the value of what he recovers. Therefore I propound,

(1.) That the county court may be established in this manner in all places. 1. That there be in every county court, a person learned in the lawes, a barrister of at least seven years standing that may be the steward of the county court, by grant from the king, *quamdiu se bene gesserit*, with a fee of ^{per ann.} of the perquisites of the county. 2. That the steward do try causes at issue in the court by jury of twelve men, and be the judge to give judgment therein. 3. That the perquisites of the courts be answered to the king. 4. That there be also a sworn clerk to make and keep the records. 5. That there be a select number of attorneys, not exceeding the number of six in any one county, to be deputed, and upon cause to be removed, the chief justice of the common bench for the time being; and none other to be the immediate attorneys to the court.

(2.) That, although in a proportion as hath been observed 10*l.* now is less than 40*s.* in the time of Ed. 1. yet I should propound so high a measure for them, but they should hold of any debt, or debt, or damage, of the value of 5*l.* where the title of freehold, or lease for years, comes not in question.

(3.) That where the sum in demand exceeds not that sum, a cause should not be removed from thence by any *recordari*, *certiorari*, *pone*, or *babeas corpus*, unless upon oath made, that the title of the land will come in question; and if upon that sum and oath, a plaint or suit be removed by either party, and it appear to be untrue upon the pleading or triall, the party removing the suit to pay double costs.

(4.) That the processes be only by summons, attachment, distress, and the execution by *fieri facias* or *levari facias*, and not otherwise.

This being thus settled, I should propound, that the courts of Westminster should not hold plea of any suit for debt or damages under 5*l.* unless where the title of lands is concerned; and if upon the triall of any such cause, or otherwise, it shall appear the debt or damages amount not to 5*l.* the plaintiff should recover no more costs than damages; and if it be found for the defendant, that then he recover double costs.

THE greatest danger imaginable in this is, that it may give handle to the erecting of country judicatures to the detriment of the kingdom. And I must confess, were this to be

effect of it, I think it were the most pernicious thing imaginable.

But certainly this is but a vain fear, unless we were in such giddy times, that could not be contented with an ease and convenience to the people, without destroying the law and the government of the kingdom. For was not that law the same in the time of E. 1. and ever since, as to the point of the jurisdiction touching matters under 40*s*. and hath it any time introduced that inconvenience? That which is propounded, is but to ease the county court of what makes it unuseful and burthenome to the people, and to render it serviceable and convenient, and to disburthen the courts of Westminster of these suits, wherein the costs to be recovered exceed the value of the thing demanded. Indeed there are some few alterations from the ancient constitution.

1. In the judge; for the truth is, I think a person acquainted with the law, and sworn in the office, is fitter to be trusted, than a few ignorant, and it may be, concerned suitors.

2. In the triall, which I would have by the oath of twelve men; and so in some counties it is used; though in others, the trial of the fact is by witnesses, and the opinion of the major part of the suitors; in others by wager of law. I hold the triall by jury returned, the best triall.

3. In the sum, which I have estimated to 5*l*. which is not so much even in intrinsical value as 40*s*. in the time of E. 1. And upon the same account, the freehold of jurors hath been raised. In the time of E. 1. it was 20*s*. then by 2. H. 5. it was 40*s*. in some cases; then by 27. Eliz. it was raised to 4*l*. and since to 5*l*.

If men indeed will be giddy and unsteady, and if we should suppose parliaments not to be wisely sensible of their own, and the public concern, men may suppose that 5*l*. may in time arise to 50*l*. and so the courts of Westminster be destroyed. He that supposeth this, may suppose things yet more dreadful. But, in my understanding, if things were reduced to this state with the county court, 1. It would be a great ease to the people. It would disburthen Westminster-hall of many suits, which is indeed a reproach to the honour and dignity of it. 3. It would prevent multitudes of oppressive suites; many men suing trifles, because, if they recover, the costs will crush and oppress the defendant, being oftentimes forty times more than the thing in dispute. 4. It would accommodate the county court, to be a more admirably auxiliary and subservient to the great courts at Westminster. Writs of enquiry of damages, might be there executed by the sheriff, and in the presence, and with the assistance of the jury, and not by a jury packed by the under-sheriff in a corner. Here outlawries might be proclaimed, tables of them set up,

up, and tables of fines, and infinite more accommodations because it would be a place of note and resort, and things would be managed with order, and much more notoriety, than it is possible they can be now as the county court is constituted.

That which seems to be the greatest objection against this is that it will multiply suites, the jurisdiction being cheap and hand.

I answer, that it is regularly true, that this doth multiply suites, but yet these allayes with it.

1. If it were admitted, yet in respect of the sum propounded it is apparently necessary, that some remedy should be provided for such sums: and it is apparently unreasonable, that they should be driven to sue at Westminster; for if the suit be necessary, he shall lose by his suite, though he recover, in respect of the expence he shall be put to.

2. Possibly at this day, many trifling and causeless suites are commenced at Westminster, to undo a defendant, with the cost in case of a recovery, or to put him to great expence; which would not be if the suits of this nature were in the county court thus qualified, where the defence would be as cheap for the defendant, as the suit is for the plaintiff; and the costs of recovery would not probably exceed the damage, but be probably less, which would be no great encouragement to vexation.

3. I suppose, that, in the progress of this discourse, something will be proposed evidently necessary to discourage vexatious suites, as well in this as in all other jurisdictions.

4. But if the judge of the court be such, as he ought to be for his learning and integrity, and the practicers sober and credible men, vexatious suites will not receive much countenance.

I shall conclude this business with this farther observation, that by this means the students and professors of the law, which are now generally driven or drawn up to London, so that there is scarce any left in the country, will have some encouragement to reside in the country, and the country not left to the management of attornies and solicitors,

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C A P. VIII.

concerning the court of common pleas, and the inconveniences that may be rectified therein.

THE court of common pleas is the great orb, wherein the greater business between party and party doth or should move. The things which seem to me fit to be rectified, are these:

(1.) In their multitude of officers, it is certain there is some redundancy therein. But I shall apply myself to one particular one, viz. they have three distinct prothonotaries, having three distinct offices, and dependent upon each officer distinct clerks, distinct attorneys; which, as the case stands, must needs distract and divide the court; for by this means one catcheth and seambleth with another; a declaration entered in one office, a plea in another; in cases of differences referred to them by the court, one pronounceth for a practicer in his office, another for a practicer in his, which breeds uncertainty and perplexity in business.

The best remedy for this would be to reduce them all to one office, under one officer, who may substitute under him such as may be sufficient and fit for the dispatch of the whole business; and the advantage of this would be great for the order and dispatch of business. And we need not go far for an evident example. The whole business of the king's bench is much better dispatched under their one secondary (I mean civil cases) than by all the three prothonotaries. But if the condition of things will not bear one officer, yet let it be reduced into one office, and that office kept in one place, the three prothonotaries equally to divide their fees, and the clerks and attorneys to be all clerks and attorneys in the same office. This would avoid partiality and confusion in the business of that court; and without the reduction of all these to one office, that court can never be well managed.

(2.) In their multitude of attorneys. This ariseth principally from these causes. 1. The scrambling and scuffling between the prothonotaries, every one striving to get as many as he can to bring to his mill. This would be remedied in some measure by the former expedient. 2. The scrambling between the officers and practicers of the two courts of king's bench and common pleas; they multiplying clerks and attorneys at large, that may catch the business of the country, and bring it thither; and these, to make friends, multiplying their attorneys as fast, and admitting any busy, bustling fellow to be an attorney, that hath but the skill to know to what office to send for a process.

And

And this breeds these intollerable inconveniences. 1. The multitude is so great, that they are not able to live one by another; and upon this account they stir up suits, and shark upon the few clients they have, and are apt to use tricks and knavery to gain themselves credit with those that employ them. 2. They have so few clients divided amongst them, that they are not able to attend their business; their employment will not maintain them through the term; but either they commit the care of it to others, or come up a day or two before the end of the term, and the business they have possibly miscarries before they come beyond a possibility of retrievance, or not without great charge and loss to their clients. 3. The court is hereby wonderfully entangled. They know not of whom to learn the state of the business that is moved before them; and if they understand who the attorney, yet they cannot see him, nor speak with him; and by this means one motion follows the heels of another, and the greatest business of the court is to set right mistakes, to punish deceipts, to examine miscarriages in proceedings; and there is no steadiness in the course of practice or proceedings.

The remedy for this would be for the court to reform the multitude of attorneys, and to abridge their number to a convenient proportion for every county; and this may be done without an act of parliament, and without any great difficulty and clamour. For, 1. There be abundance of these scarce fit for this employment in respect of their honesty. And 2. many more in reference to their ability. A strict and impartial examination in this kind would cast off abundance of rubbish. But 3. if there were but this order put in execution, that all persons should be put out of the roll, that continue not for four terms together from the beginning of the term to the end, it would scale off a multitude of them; for many of them have neither causes nor credit to last out a Michaelmas term.

I know the jealousy that hath ever spoiled this attempt. The prothonotaries cry out, that the other courts will get the start of them; they will have their clerks angling for business in the country, while these are attending without any at Westminster.

But 1. Surely a full agreement of all the great courts would remedy this. If it were done, the court may be preserved, and in time will grow into business as it grows into order; but the tympany of attorneys will, in a little time, destroy and confound it. But 2. If the disease of the multitude of attorneys be so stubborn and uncurable, yet methinks at least the court might appoint four or five, or more in every county, who should be, if it were, the attorneys in ordinary, through whose hands all the rest might hand their business to the court, and who might give

account of all businesse to the court, as the six attorneys in office of pleas do to the court of exchequer; and the rest may as solicitors or attorneys at large. This possibly would cure disorder, as in relation to the court; because they would have always a person at hand that should give to the court and receive directions from them upon all emergencies. But I must confess disease would be never the more remedied in the country.—the barrettries, and promoting of suites, would be as effectually tried on by these half attorneys as before. Therefore the best were to reduce their number and employment.

3.) Their defect of sitting clerks in the prothonotaries offices, a great deficiency; for by this means clerkship, which is of great use, both to the court and client, is lost, and a stock of ignorance and barbarism nourished. And besides the advantage which accrues in this respect, there would by this means, at least in reference to the court, arise a good supply for the prevention of that inconvenience, which otherwise ariseth by the multitude of attorneys; for every attorney might employ his sitting clerk, with whom he might correspond, and who might from time to time give an account to the court of the concerns of every attorney for whom they are employed.

4.) There are certain unreasonable impertinences used in that court, which doth not only exceedingly prejudice the people, but also every court at Westminster the advantage of them, and serves for no other use but to swell the attorney's bill, and at present helps to fill their prothonotarie's pocket, and to reimburse the advantage the purchase of his place, viz. 1. The common writs of new assignment, which are utterly needless. Yet the court payes sixtimes over for it, and which the court may rectify by order, that the place be particularly expressed in the declaration, as it is done in the king's bench. 2. The imparlance writ, which may be as well supplied by the paper book of the office as it is in the king's bench, and serves for no imaginable purpose, but for the prothonotarie's profit, and to make errors and mistakes. 3. The repetition of the original in the declaration, in some cases in the *venire facias*. And this is also paid for by the court without any need at all. These may be all rectified by the court, if they would but venture to displease the prothonotaries.—And to these I shall add these two things, which should be altered but by parliament, and are preserved only out of needless superstition of what was ancient, unless it be to give the courts the start and advantage of them. 1. Their *dies returnas* and return daies should be altered, and all continuances should be *de die in diem*, and not to be bound to common daies or returns

returns, neither in real nor personal actions; for it is of no import at all, but much retards and disorders the business of court. 2. Their fifteen daies between the teste and return of their process is vain and unnecessary. It is fit, that such things as these should be left to the direction of the court, and not have the court laced up in such impertinent strictnesses in matters of so light a moment and use, but of great inconvenience, delay and incumbrance to business.

(5.) The binding up that court to the practice only of serjeants at law is a great disadvantage to business. Every man is not a learnedest man, that gets the coife; and if it were so, yet not till a declination in strength, years and nimbleness of understanding and apprehension. Men are not assumed to that degree, till they are old and rich, and able to undergo the charge. And if they were younger, yet they continue till their decline age. It might be a good expedient and encouragement to learning, if at least readers were admitted to that bar, though serjeant had the pre-audience. This would be a means to that court with the business proper for it; and it is one of the consumptions of that court, that it is otherwise; for men resort to that counsell that at least they think fittest for their business; and if they are constrained to employ none but serjeants here it will necessarily send the business to that court where they may have their choice of counsell.

(6.) That, which is likewise an incident business of that court though the same properly concern the chancery, may be considered, viz. the payment of fines upon original writs is a great means of the decay of this court, and gives the king's bench a great advantage over it, and puts this court to very uncomfortable shifts to hold pace with the king's bench, viz. to make use of that unwarrantable writ called *clausum fregit*; to suit with the king's bench *latitat*. The things that I should propound in order to this should be,

1. That all fines upon original writs, at least in personal mixt actions, should be taken away by act of parliament, that the subject might have equal freedom to sue in either court in matters proper for the jurisdiction of both courts, without being necessitated or invited to the king's bench, where the process is cheaper.

2. That yet, because these fines are an antient revenue of the crown, and possibly such a revenue as is reasonably conveniently laid upon those that sue, and likewise the ordinary revenue of the chancellor, master of the rolls, curators, and therefore fit to be supported, though not in

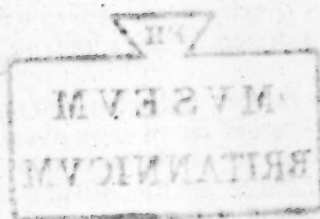
value and equivalence; that a medium be taken of the yearly upon these fines upon originals, that are propounded to be away, and that there be a medium also taken of the *latitats* of Middlesex that issue out of the king's-bench; and that be such a proportion of fines laid upon *latitats* and writs as in the whole countervail the usual estimate of the fines upon originals as they were usually taken about 4. or 5. Car. 1. and the provenue be settled on the crown, and distributed to the clerk, master of the rolls, and cursitors, in such proportions as upon originals were.

convenience of such a provision by act of parliament would It would prevent that intollerable scrambling and disorder, happens between both courts and the officers and practicers when there was an equal advantage in each court; for as I it is of great use, that the court of common-pleas be preserved from that consumption, which it suffers in a great measure of fines; so I think it of great concernment, that the jurisdiction of the king's-bench in civil causes should be upheld, as that it is the great nursery of the knowledge of the law and the breed of young practicers therein, as that it is reasonable that the subject may have a just election to proceed in either in matters wherein they have a common concurrent jurisdiction, and not be necessitated to sue in one, which in some and upon some emergencies may be inconvenient.—2. It presently amend these new inventions, which either court contrived to save themselves, though possibly with some damage to the people, viz. the *clausum fregit* in the common-pleas, the special *latitat* lately contrived in the king's-bench to preserve their just jurisdiction, which had been lost by the late act giving bail without that expedient.



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A
R E A T I S E
OF THE
MASTERS of the CHAUNCERIE.

This treatise is extracted from volume xiii. of Mr. Petyt's manuscripts, in the Inner-Temple library. It doth not appear, who the author was, other than that he was himself a master in chancery, and was a cotemporary of the famous Mr. Lambard. The editor referred to the treatise, by the notice taken of it in Mr. Barrington's valuable and pleasing book on Antient Statutes. See Barrington on Ant. Stat. 4th ed. 90. The handwriting of the original manuscript is so obscure, that, at one time, the editor almost desisted of obtaining an intelligible transcript. As to the time of the writing, it appears from the contents to have been written whilst sir John Egerton was only lord keeper, and before he was created earl of Ellesmere; which fixes the time to be, between May 1596 when sir John Egerton was created lord keeper, and July 1596 when he was created baron of Ellesmere. If this was not so clear, the singular obsolescency of the spelling might induce a conjecture, that the manuscript was of much earlier date.]

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A
T R E A T I S E

OF THE

MASTERS of the CHAUNCERIE.

the better unfoldinge of this whole matter wee will hold
ourselves to this course: FIRST to treat of the manner of ther creation;
SECONDLY of the fundrie appellations or names and of ther num-
BER of ther dignitie and place in respect of ther
THIRDLIE of ther duetie and service in chauncery, and
FOURTHLIE of ther learninge is requisite in them; FIFTHLIE of ther
advances and rewardes.

I.

In treatinge the manner of ther creation, I finde it to have bene
done many times in sundrie sorts; for in auntient times I finde it
was granted from the kinge, as 7. E. 3. *Claus. 2^a. part.* to
John Langetoft, and 49. E. 3. *pat. 1^a. part. m. 27.* to one
Robert Coddington, and 2. H. 4. *pat. 1^a. part.* to one John Kinge-
ston. In Ed. the 4th his time, this seemeth to have growen
into use and remembrance; for in the argument of Bagot's
case 4. 5. it is sayed, that in the chauncery the clarks are
divided into four formes, viz. the masters of the first, the bouchers of
the second, and the cursetors of the third; and they are to be ad-
mitted by the court and sworne; to which PIGGOT answers, "I
finde that the masters and bouchers, &c. ought to bee admit-
ted and sworne; but Baggot hath his office by letters pa-
tent in which case by force of his letter patents hee is an
immediately, which *Laken et tota curia concessit.*" And in
the latter hath it ever sithence continued, savinge that where-
in former times there was noe entry made of the per-
sons

It is now
best to re-
member,
that the
doctors in
the univer-
sities doe
use this
manner in
their crea-
tion; and
master is as
much as
doctor in
our uni-
versities.

sons admitted and times of ther admittance to ther place the chaunceller, it is ordayned by sir Thomas Egerton, lord of the great seale, that there shall be a record made therof the close rolles by those of the pettie bag: the which though peradventure in owld time it were not heald neede when the maisters heald ther places in the hostel of the chauncery and were sufficientlie knowen by those liveries which they had of the king's giuft and of the chaunceller's delivery; yet for this day certainelie it is most necessary, when both the former are growen out of use, and I wonder whowe it hath bene so longe omitted by his lordship's prediceassers. Nowe in the forme of the creation, namelie in the putting on of a cap, is a representation of antiquitie and mastership, not unlike the usuaige amongst the Romaines, when men were made citizens of Rome. And as amongst them a cap was the badge of the freedome of that citie; soe in former times those were admitted into the number of the masters, that had bene brought up and instructed in the court from ther youth, that by the advisement and consent of the king's counsaile of chauncery. 7. E. 3. Cl. 2. part. et 9. E. 4. 5.

II.

Concerninge the names and appellations, I finde of those that are common to all (over and besides some particular subdistingued to the number of nine, viz. *magistri cancellaria, concilium cancellaria, focii, collaterales, clerici de prima forma, clerici de secunda gradu, clerici de majore gradu, clerici magni, clerici ad rotam* all those warranted by record and good authoritie. They are also styled *judices* in a certaine treatise that runneth in many copies in divers mens hands, the title whereof is, *De Magno Concilio Anglia et ejusdem Cojudicibus et eorundem autoritate*. But the auther of the sayed Treatise hath compiled thereunto many things worth the notinge and observeinge, yet in this of *cojudices* I take it he was deceived; first, for that I finde it in any record; and next, it stands not with sound reason for if they were *cojudices*, then they cannot bee *consilium*, the one denotes an equalitie of power, the other an authoritie onelie. Now the auntient kings of this realme seeme to have disposed of the court of chauncerie in such sort, as the chaunceler should bee the magistrate thereof, and the clerks of the first forme should assist him as his counsaile. *consilium* is defyned *confessus eorum qui in causa vel publica*

pratore aut iudice cognoscunt. They are therefore called *Præteus in*
 es; for of *adessor*, it is sayed, *unus cujusque judicis por-* *verb. con-*
atur, quâ ex re comites dicuntur et participes comites; *cilium.*
sedendi particeps consilarii. And it seemeth, that there *Curiar. in*
 skill and knowledge expected at ther hands, then at *Cod. lib. 1.*
 nds of the magistrate himself. Further it is sayed, *offi-* *tit. 5.*
essoris his fere causis constat, in cognitionibus, postulationi- *L. 2. Dig.*
ellis, edictis, decretis, epistolis. Accordingelie in our chan- *de officio*
 ou shall never find the lord chaunceller's name subscribed *assessoris,*
 writt or pattennt; yet notwithstandinge the whole power *L. 2. D.*
 mmandement resteth in the magistrate or chaunceller *de officio*
 And that which appertaigneth properlie to the assessor *assessoris.*
peritas, not imperium; and out of the 60 *Novella* it appe- *Gothofred,*
 nientlie, that *assessores non sunt iudices.* And therefore I *commen. in*
 e masters of the chauncery not to bee rightlie tearmed *Cod. de of-*
 . *ficio assess.*
 . *1. 2.*
 chinge the other names; to proceed with them in order :

magistri Cancellaria they are called 51. Ed. 3. and 9. E. 4. the *In Comput.*
 of which name I gather owt of Cassiodorus, whoe sayeth, *Hanaper.*
adum honorem sumit, quisquis magistri nomen acceperit; quia *Rot. in*
tabulum semper venit de peritiâ; and out of Fleta, whoe *scaccario.*
 that they ought to have *notitiam plenorem in legibus et con-* *Variorum,*
sibus Anglicanis; and that the cursetors and other inferior *lib. 6. fo.*
 should write *sub advocacione clericorum superiorum qui* *96.*
facta in eorum receperint pericula. Soe as it seemeth, that *L. 2. c. 13.*
 er clarkes of the chauncerie were under the masters, as *Ibid. cir-*
 rs were under ther teachers. *cum finem,*

consilium regis in cancellariâ they are called 1 Ric. 2. where it *Rot. Com-*
 eth they granted a protection to one Nicholas Clarke; and *munia Parl.*
 2. where Bertran de Bullingebrooke is summoned to bee *prim.*
nobisc. et consilio nostro in cancellariâ nostrâ. And in like sort *Theolal.*
 Osborne was to bee attached by the shrieve of Lancaster, *Brev. Reg.*
am habeas coram nobis et consilio nostro in cancellariâ nostrâ; *Ibid.*
 E. 2. where it is sayed this writt was made by the common *Abridg.*
 ll of the chauncery accordinge to the statutt of Westmin- *Fitz. pl. 6.*
 e *conquerentes recedant à cancellariâ sine remedio;* and in *Ed. 3.*
 e ther are thes formall words, *loyallment counsellors le roy*
seront requisite.
 and *collaterales* they are tearmed by Fleta. *Collaterales,* as *Clericorum*
 ld seeme, because they sate by his side at a certaine table in *cancellar.*
 inster Hall and in other places; as is alsoe proved by this *lib. 2. c. 13.*
pro panno empto ad coperiendam tabulam marmoream ante *51. E. 3.*
arium et magistros cancellaria regis ibi sedentes et in aliis locis *in Comput.*
bus cancellarius sigillare contigerit pro honestate sigilli regis. *Hanap.*
 they are called improperlie; for, as one sayeth well, *societatis*

- tatis importat* *fortunarum et periculi communis inter pares; comitum vero*
proprie ad eos pertinet, qui alium prosequuntur. Soe Ceasar these words, *causâ victoriæ Pompeii comitem esse mallet* quàm Ceasar is speakinge of Labienus. As likewise *sodales* are bee *qui ejusdem collegii sunt*, as the masters of the chauncerie be called in regard of themselves one towards another. In regard of the lord chaunceller, they may most properlie be called *comites*, which worde is sometimes taken equivalent with *officium*. Cicero in *epist. ad Quintum fratrem* writes, *quos tibi comites iutores negotiorum publicorum dedit ipsa republica**. In all the tinent accompts of the hanaper they are also called *commensalarii* in this sort, *pro expensis cancellarii et clericorum commensalium* 500l. Of which name Fleta (this would be last not as name, but by the way) giveth the reason in the after the Lattin of that time, *pro victu et vestitu honeste debere veniri de proficuis sigilli in cuiuscunque usus pervenerit.* And cordingelie it is sayed, 1. H. 6. *pro Simone Gainsted custode pro se ac sociis suis et aliis ministris cancellariæ secum commensalium ut moris est, &c. deallocat. custodi hanaperii* of his expences.
- Clerici de *primâ formâ* they are named 9. E. 4. 6. and in patent of John Kingeton, 2 H. 4. and likewise in Grench pament, 12. H. 4. and in many other places; as *Henricus dook*, is called *unus duodecem clericorum de primâ formâ*, 27. The which phraze of *prima secunda & tertia forma* is not devised by our English Latinists, but often used in both the of Justinian and Theodosius, *Cod. lib. 12. tit. 24. l. 7. et l. 1. 2. de Cod. Theod. de Castrensiensis*. Yet the reason of name appeareth not, neither in the text it selfe, nor yet in the menters that write thereupon; tho' most comonlie in such ters they seeme verie curious; I meane Cujacius and Pancius. *Credendum est*, sayeth Pancirolus, *prima forma viros sequi plures annonas habuisse*; and that is all that is sayed thereof for understanding of the word *annona* it is to be noted, the lowances of diett, which the emperors made to their either *militares* or *civiles*, were called *annona*; as the allowance for horses and other beasts were called *capita*, that is *pabulamentorum*.
- Clerici *primi gradus* they are called 35. E. 3. and 43. in directed *Radulfo Ravenhoe custodi hanaperii*, to allowe *dilectis nostris primi gradus cancellariæ nostræ* 10l. *pro expensis suæ*, &c. Both of this allowance and of the word *gradus* shall have occasion to speake hereafter.
- Clerici de *maiore gradu* they are called in Codington's patent as likewise in Langetoft's pament *magni clerici*. *Nostris clericis* they are called 24. E. 3. 13. in the yere-books, where

D. 47. tit.
22. l. 4.

L. 2. c. 13.

Claus. in
dors.

Cujac. Pa-
ratit. lib. 1.
Cod. tit. 52.

Claus. in
dors.

49. E. 3.
pat. par. 1.
7. E. 3.
Claus. 2. pac.

* Cic. Ep. ad Quint. fratr. lib. prim. ep. prim. — EDITOR.

that the king called unto him his chaunceller, treasurer, his
 and his clarkes of robes in chauncery, to know ther opini-
 concerninge a suspitious deede of releas. The reason of which
 grew from this, that they wore robes or gownes of the King's
 by the chaunceller's delivery, as appeareth 21. E. 3. *Claus.*
 in a writ directed to Richard Thoresby, keeper of the ha-
 to allow the bishop of Worcester, then chaunceller, 4 l.
 d. that he had layed owt above the King's allowance upon
 robes by him delivered to the clarkes of the chauncery, for that
 e, *propter caristam panni et fendalli.*

In all the
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ed to have sayed thusse much of the generall names may suf-
 except wee shall note, that the king ever calleth them *clericos*
 and sometimes with a double *noſter*, as *clericos noſtros can-*
noſtra. And they were called *clerici*, because they were
 of all of them cleorggie men, and the word *clericus* is
 for him *qui dominico cultui in ministerio religionis impendit*,
 he called à *Graco* $\chi\lambda\epsilon\gamma\varsigma$; *solebant enim per sortem eligi.*

uchinge ther number, it appeareth planenlie in Henrie Cod-
 on's pattent, that from all antiquitie it hath bene twelve;
 ere it is sayed, *conceſſimus, quòd ſit unus de duodecim magis-*
cancellarie noſtre in ſupplementum dicti numeri magiſtrorum,
unus deſicit, &c. which number concerninge the ordinarie
 ſtill remayneth; the maſter of the rolles beinge alwaies
 ſt, whoe therefore is ſometimes ſtiled *unus cancellariorum*

and the pronatorie another; and the reſt in auintient time
 diſtributed into commaunders and examiners. There have

of late time many more maſters admitted, and tearmed by
 me of extraordinary maſters; and it ſeemeth ſoe they bee,
 maye bee very diſputable, howe they are warrantod to exe-
 &c. Yet ſeinge by an order of my lord chaunceller Hatton

is alſoe confirmed and enlarged by my lord keeper Egerton,
 re limited to certain confines, I finde noe great cauſe, that
 dinarie maiſters have to complaien of any prejudice donne to
 as beinge as the ſayed orders are obſerved, whereby they are
 member, that they are called *in partem ſollicitudinis*, and not
ſollicitudinem poteſtatis. In this number may bee obſerved, the

tion to thoſe that ſit one the other benches at Weſtminſter,
 20. E. 3. are ſeit downe ſpetiallie by name, and even the ruffle
 robes particularle deſcribed alſoe; and then were there fix
 of the common place, four of the king's bench, and four
 of the exchequer. Soe as it ſeemeth, that at the firſt in-
 on it was thought neceſſary to have almoſt as great a num-
 direct the compoſinge and awardinge of originalls, as of thoſe
 ere to diſcuſſe and determine matters brought before them

by

49. E. 3.
 Pat. 1. par.

Fra. 6. H. 8.

Crook's
 auintient
 orders of
 the chaun-
 cery.

Claus. 1.
 part. in
 dorſo.

There can
 be no ob-
 ſervation
 hereby of
 ther places.
 They were
 more and
 fewer at the
 pleaſure of
 the kinge.
 There were
 nine judges
 of the com-
 mon lawe
 14. E. 3.

by originalls into judgement; except perchance their number
 foe great, for that they were to assist the lord chaunceler for
 then common lawe causes, as civile, canon, &c.

III.

Toucheinge ther place and dignitie in respect of other offices
 the same hath of late yeres bene verrey much and disproportion
 abated, and cheiflie upon this occasion. Doctor Barkley, a
 ter of the chauncery, in the 18th of the quene, sittinge in
 parliament howse, as the manner is, upon occasion of speeche
 amongst the lords of certaine officers to have certaine priviledges
 without askinge leave got up, and entred into a speech of
 ringe, that the masters of the chauncery might alsoe bee
 prised in the sayed priviledge then one foote; which request
 foe unseasonably, and was so inconsideratelie propounded by
 said doctor, as the lords in generall tooke offence thereat;
 amongst the rest some of great authoritie sayed, that whilest
 quene's learned counsell were silent, it were great presumption
 him, beinge one inferior to them, to bee foe busie. Soe as
 this the next day, the serjant, attornie, and sollicitor, tooke
 above the masters of the chauncery there, which before time
 never bene donne; and ever sithence, not onelie they, but serjants
 at the lawe alsoe, doe it generallie at all publike meetings,
 this reason, that they tooke place before the attornie and solli
 tor. The which point, as against the attorney and sollicitor, w
 palpable every daie raseth higher then other, it is not perh
 sitt to dispute; foe as toucheinge serjants at lawe, to my un
 standing, there are many reasons, whie they should not
 precedence. But what congruitie there is, that the master of
 chauncery, whoe by the function of his place sitteth one
 bench covered *coram domino rege*, should out of that place
 behind the serjant of the coiffe, whoe in distinction from oth
 the king's serjants was called serjant counter, and by the fu
 on of his place standeth likewise uncovered, not onelie in
 court of chauncery before the lord chaunceler, but in o
 places alsoe when they come to debate matters for ther
 before the master; let thes judge. And though Brooke
 Abridgment noteth upon a cas, that speaketh of knight
 to bee a name of dignitie, 14. H. 6. 15. that
 place of a serjant at the lawe is also a dignitie, be

West. 1. c.
 29.

Brooke
*Nome de
 Dignitie,*
 33.

writt runneth *ad statum et gradum servientis ad legem*, &c. that 2. H. 4.
 not make him over-reach the master of the chauncerie, whose 12. H. 4.
 is alsoe tearmed *status et gradus*, both in Knighton's and
 ehurste's pattents, and ther pattents were under the whole
 whereas the serjant hath his *status et gradus* by a pettie writt
 ede *sgilli*, and is to stand at the barr, whereas the master
 his *status et gradus* by a full pattent under the whole seale and
 bench; and therefore it is not simply called *gradus*, but *major* It is good
 in Codingeton's patent, and *primus gradus* in a writt to to see what
 nster clark of the hanaper, 49. E. 3. 35. et 31. E. 3. This is places they
 spect of ther degrees in the same court, and soe the compa- heard at the
 holdeth, but not in respect of other courts, for certaine al- coronation
 nces to bee made to them. But for assigninge of them ther of kings.
 place, the matter may be thusse considered of.—I take the There is
 er to stand, that the name and office of chauncery was first twice men-
 ht into England owt of France, as Pollidore Virgill affirmeth, tion of them
 hat by William the conquerer. But as in the man hee was in Hall's
 ed (for there is mention in fundrie records of one Renibaldus Cronicle.
 was chaunceller to Edward confessor) soe have I in an other
 plentifully proved, that in the thinge it selfe hee was not de-
 d, but the sayed Edward beinge brought up in France, or some
 , brought it first from thence hither. In the court of France,
 whence I doe agree with Pollidore Virgill the name was Yet see Mr.
 ht into England, though before the time of William the con- Lambert's
 er, there are two sorts of the masters of the requests; the one collection,
 el, whoe have the same office that our masters of requests that Edgar
 here in England; th' other *du palais*, whoe assist the chaun- and divers
 of France in the French chauncery, as our masters of the other Sax-
 ncery assist the chaunceler of England in the English chaun- ons had
 cers. ther chaun-
 This the Frenchmen seeme to have drawen from the court cellers.
 come, as where ceremonies are most exactlie observed, and
 e they have a spetial master of them, and where they have
 two sorts of masters of requests, the one *signatura gratia*, and
 her *signatura iustitia*. The first sort of registers consisting
 favor the kinge reserveth to himselfe. The second, which re-
 th care and industrie, and is not soe plausible, hee leaveth to
 ficer the chaunceler, under whome the masters were wont to
 lite the same; for profe whereof 21. E. 3. 47. it appeareth This would
 lie, that all petitiones of right ought to bee directed by ther serve better
 cement to the chaunceler, and to none other, and to bee de- in some
 med by the chaunceler, and counsel of that other place
 . And of the au-
 ngelie, *Articuli super cartas*, c. 6. faieith *soubes les peties seales* thoritie of
 aies n' issiera nul breve que touch commune ley; et 11. R. 2. the court of
 lettres de signet ou secret seale nostre seigneur le roy ne soient de chauncery.
 envoyez en damage, ne prejudice de roialme, nen disturbance
 de

de la ley. I take it that ther place, as ther function is, should immediately next to the masters of the requests, with whome participate alsoe in name: The serjants at lawe, whoe sustaine indeede publique presence for delivery of the king's people in suits of lawe *ex officio mercenario*, cannot in any congruite of son bee placed before those, whome the kinge stileth with name of his counseilers, and that serve not onelie for the deliuerie of the people in ther private causes, but for dispatch of the king's own busines also. And hereunto add, that all be donne before them in any place of the realme, are sayed bee donne *coram dominâ reginâ*; and then in regard of her iustitie's honor, those that sustaine thes places ought to bee respected. And certainlie the great inconvenience of this doeth of ther reputation redoundeth to the chaunceler himself; first that it is an indignitie to the hight of a magistrate to have his laterals and assistants of soe meane qualitie; and next, for all his decrees beinge arbitrary (in which case one of the parties thinketh himself ever either wronged or hardlie borne) hee neede to have some joyned with him of such qualitie and reputation as may sustaine and break some of that streame of evill will and envy, that ordinarilie pursueth him. This my lord treasurer Burleigh observed in the exchequer, whoe increased the dignitie of his assistants the barons, insoemuch as the serjants at this debate not the precedences with the inferior formularly barons that court, whome I assure my selfe in former times was not equal in reputation with the masters of the chauncery, but in the same analogie and perfection to them that the court of exchequer is to the court of chauncery. And feinge the master of the rolles the first master of the chauncerie, taketh his place (and not his office of *custos rotulorum*, which is an inferior office) between the too cheife iustices, it maie be partlie estimated where his lowes ought to take ther places.

IV.

But nowe I come to the great and maine point of this treatise resting in two branches, ther service and ther learninge, but incident as they can hardlie be severed.

The first and cheife point of ther service and of the skill required thereunto, I find mentioned in Fleta, whome saith, that *corem*

Composing
of Writts.
Lib 2.c.12.

præ-

que possum in conquerentium querelis et supplicationibus audien-
examinandis, ut eis super qualitatibus injuriarum ofensarum
remedia exhibeant per brevia regis. For ther habilitie,
 in that booke requireth four things in them, that they bee
 first, circumspect, *domino regi jurati*, and lastlie in *legibus et*
studiniis Anglicanis notitiam habentes pleniorē; the manner
 of this service is particularlie expressed in the foresayed place of
 18. E. 3. that namely some of the masters, named com-
 manders, should consider of the proper writt or commission fitt
 to redresse every particular greife or wronge which is com-
 mitted of, and direct the cursiters and other inferior clarks to
 be made; and others, againe, tearmed examiners, when they
 be made, should examine them, *in ratione, dictione, et filla-*
litera, before they be put unto the seale. And heretofore,
 doubts did arise upon writts sent out of the chauncery, or
 formed and composed there, not onlie the king's justices were
 to send to conferr with the masters concerninge the same; 2. R. 3. 2.
 the kinge himselve hath sometimes, together with his chaunce-
 reasor, and justices, called alsoe his *clericos ad robas*, to con-
 sider about such causes. And albeit the cursiters have soe farr eman-
 cipated themselves by the devise of a certaine lord keeper, whose
 by raised matter of proffit, not onely to his successors, but
 to his heires also, with wrong and prejudice to the masters of the
 court, and detriment (as it hath sithence fallen out) to her majestie's
 service (as it would be hard to reduce them nowe to the first
 situation) yet, upon consideration had, I think it would appeare
 convenient to have some other writts to bee compounded,
 that all generallie to bee examined after the auncient manner. For
 to be understood, that the writts of the chauncery are of three
 somme of coursse, as originalls returnable in other courts;
 of grace, as *subpœna, supplicavit, certiorari, ne exeat reg-*
injunctions, commissions, and somme other of forme, as
clausum extremum, mandamus, qua plura, scire facias, elegit,
 &c. Nowe as the first sort are appropriated to the cursiters, and
 left to the master of the rolles and his clarks; soe for the mid-
 dle, which properlie appertaine to the masters, and therefore
 the writts of *action* and *Fleta* are called *magistralia*, there is great reason to
 have them restored to the care and allowance of the masters; for, as
 the writts of *assise* nowe, every inferior clark without controllement prefers
 to the seale stuffed for the most part with such
 error and want of coherence and forme, as is fitt to make both the
 founders and the writts themselves ridiculous, but far different
 from the auntient gravitie and learninge of the court. Again, touch-
 ing the writt of *suppenna*, there is yet a farther reason, for the ob-
 taining

Examina-
 tion of
 writts.

2. R. 3. 2.
 et 4. E. 4.
 41.
 2. E. 3. 13.

Writts

Writts

The gaine the counfallers have by drawing the bills more then by suits at common lawe, and the little skill required in them, hath filled the chauncery soe full of causes as I conceive.

*Stat. de fac-
ca clericorum
cancellarie.*

Composinge
of lettres
and pat-
tents.

tayning of which the complaienant preferreth a bill, which order (begunn as they saie in sir Thomas More's time) is now subscribed with the hand of a counfaller at lawe, and soe passeth ownt farther examination. But it were more agreable to the thortie of Fleta and to reason itselfe, if the consideration of the bill were also referred to the master of the chancery before the suppena issued, that he might consider, whether the matter therein containd bee fitter to be dismissed by original or retayned by suppena; for it is to bee supposed, that in matters the maisters of the chauncery have more skill and affection, then the counfallers at lawe; whoe, though they be skilfull, yet frame themselves to satisfie ther appetites that retayne them. And by this course would all the charge trouble and delay, that groweth by demurrers upon bills, utterlie cease. Againe, in puttinge writts unto the seale the care of the examiners seemeth fitt to be renewed, seinge nowe they are put thitherto every pettie clark's discretion, bee hee never so ignorant and unskilfull, without any overloking or examination at all; for as is doubtedlie most of the writts must carrie with them errors and congruitie, writing not accordinge to the cours of chauncery, rasures and blottings; none of which by the auntient custom of the chauncery, as Fleta witnesseth, ought to bee tolerated. Besides, if all writts were brought by those that write them (for in their office they are bound to doe) to the examiners, and were put into the pettie bag under ther seales, from whence they should be drawn forth to great seale, neyther would there be great tumult and stirr, nor soe much sealinge of writts at severall times, as nowe is usuall.

And I take it, ther care both in composinge and examining stretched somewhat farther then to writts; namlie to pattenring of lettres to bee written for the kinge, and to examininge of new and exemplifications; and that therefore in this behalfe there are also too points of learninge requisite in them more then are mentioned in Fleta; the one, skill in the chauncerie course of pattenring; the other, good skill in the Lattine.—That they were caused to bee written in ther names thos pattents that came into the chauncerie by warrant of privie seale, and otherwise, is evident by sundrie auntient pattents, to which ther names are subscribed. And although some chauncellers alate by usurpation have rested the writings of theses pattents also from them, and propose it not by the advise of the king's counsaile in chauncery, the clarks of the court, but to the proffit of ther owne servants; yeat by what right it is donne maie appeare by this, that the chaunceller's owne name is never subscribed to theses pattents; and albeit the warrants be directed to him

ust they be otherwise hee Besides, to them; i prosecutor t scholas Cla feldome of at was sent well skilled itles, it seve ge lettres to stipends to find many to the emp the emp thereof l and other m life in answe is cunning and yet den peace with ay, demand der arrest s counsaile words, but gh from me rt to fundrie Armenia, imposed with s and choi ave Lattine muche tou ation of r used at thi scribe the ne inrollem otherwise the ee hee nev that hath l one, is not seinge by po de also, that pendinge in e, when th parts of Elliot, on to Devon

must they be expedited by the officers of the court under him,
 otherwise hee might call the scrivenor of London also there-
 Besides, it semes the awardinge of protections appertaign-
 to them; sometimes upon oathe made and suertie put in by
 prosecutor thereof, of which sort one by them was granted
 Nicholas Clark; and sometimes upon bills, and not writts or
 seldome of the privie seale, or of any captaine or ambassa-
 dat was sent one the king's service. And by reason that they
 well skilled in the Lattin tounge, and used to composinge
 lttles, it semeth also the king used ther paine and skill in
 ge lttres to forraigne princes, without charging himselfe with
 stipends to Latine secreтарыes as nowe is used. And of this
 find many recorded one the backside of the clofe rolles; as
 to the emperor, which beginns *Serenissime Princeps*, the ar-
 nt thereof beinge nothinge but a congratulation of his elec-
 and other matter of compliment; and another to himselfe
 in answer of a former suite by the emperor to the king,
 is cunningelie composed, shewing in words great good
 and yet denyinge with as greate dexteritie his request touch-
 peace with the French kinge; another to Magnus kinge of
 ay, demanding restitution of Englishmens goods that were
 der arrest by his officers; another to the pope by the king
 is counsaile under the great seale, where they give him
 words, but prohibit his Holines notwithstandinge expresse
 gh from medlinge with any benefices in England; and in
 rt to fundrie others, as to Albert duke of Aultria, to the
 Armenia, to the king of Castile, and to fundrie others;
 composed with that gravitie and congruitie of sence, and that
 ls and choice of words, as I dare undertake none of thos
 ave Lattine secreтарыes could amend any of them. And
 muche touchinge ther composinge—Nowe touchinge the
 ation of records, pattents, and exemplifications. It is
 used at this day, but yet not in dewe forme; for nowe
 scribe ther names severallie, whereas they ought to ex-
 be inrollement and the exemplification jointlie together;
 ewise the inferior clark that writes it maie deceive any
 ee hee never soe attentive. And therefore the spetiall
 that hath bene made of examining lttres pattents to one
 one, is not only injurious to the masters, but absurd in it-
 inge by possibilitie one man alone is liable to performe it.
 le also, that the examination of witnesss for tryall of mat-
 pendinge in chauncerie hath bene a peice of ther charge
 e, when those examinations were taken owt of the court
 parts of the realme. And therefore it appeareth, that
 Elliot, one of the masters of the court in H. 7th's time,
 into Devonshire to examine witnesss of certaine things
 donne

Fra. 1. R. 2.

par. 1. c. 1.

Fra. 17 H. 3.

Cl. 9. E. 3.

Cl. 39 E. 3.

Cl. 35. E. 3.

Cl. 43. E. 3.

Cl. 15. E. 3.

Cl. 9. E. 3.

Cl. 10. E. 3.

Examina-
tion of re-
cords and
pattents.Brend exe-
cuted that
place; but
I think it
was by de-
putation.Examina-
tion of wit-
nesses.Brevia re-
gis 4. H. 7.

donne at Bourdeaux in France. The care of examininge was committed to Ralph Grenehurst, pronotarie of the whereof hee was to make report to the court both under his name and *ore tenus*. And as it seemeth there is great reason, why the peice of service might bee better performed by the masters of the court, then by such commissioners as are nowe-a-daies chosen: for in wainge and consideringe of depositions the masters and canonists holde, that the countenance the constant assurednes, the waveringe and irresolutenes, of the deponents spetiallie to be regarded; of which point the masters, that bothe take the depositions and assist the lord chaunceller at the hearing of the cause might well informe him, which the commissioners being absent cannot doe. Adde hereunto, that they would bee dispatched with greater skill and greater surerie the masters havinge much exercise and learninge, and being affectionate to the parties, then it can bee by the usuall commissioners, being for the most part unlearned, unexspert, apt to be cumvented by some craftie associate of thers, and ever affectionate to one of the parties, and as I thinke with lesse charge to the also. And thusse much of examinations taken owt of the court. Those taken in court were heretofore donne either by the chaunceller himselfe, or by some spetiall man to whome the chaunceller committed it. Upon interrogatories exhibited by Coddington *narratore regis* and his serjant, the bishop of Winchester the chaunceller examyned one that had brought bulles of provision from Rome. By the appointment and commandement of the chaunceller, John Rothewell was examined before John Wylkeinge master of the rolles of what estate he was seized in lands.

Cl. 1. H. 5.
in dorf.

& 14. H. 4.

Receiving
attornies
general.

Another part of the service of the masters consisted in taking of attornies generall, of whome mention is made both in the statute of 18. E. 3. * and also in the register fo. 20. the manner was donne after this manner. When any of the king's officers by his licens or imploiment was to goe out of the realme to some garrison towne in the realme, it was lawefull for him to choose one or more of his friends, whome hee might detain in his absence *ad lucrandum aut perdendum* in all places *motis et demoris* in any court of England; and when he had declared their names before one of the masters of the chauncery, they received of him writts *de attornato generali constituto*. Those names, as the attornies as of the partie and of the master that tooke the spetiallie inrolled of record, most commonlie in the forraigne and sometimes in the pattennt rolles. And of such attornies

* 18. E. 3. R. 5.—EDITOR.

relie made some thousands in E. 3.'s time and R. 2.'s time, kings that preceded and succeeded them next, as by the of those times manifestlie appeareth. Those, who went one of the king's service eyther in warr or ambassinge, were at ther either to make such atturnies, or to have protections under great seale upon certificate from the privie seale, (which served for testifyinge and commandinge matters resolved by the counsaile) or from the ambassader or captaine under conduct they went. And somme had both protections and atturnies alsoe; as William Sterme being to goe one Fra. 8. H. 4. into Russia. And if this cours were renewed againe, more commodious for the parties and more warrantable, then thes which are now used.

Manucap-
tions and
recogni-
sance.
18 H. 6.
18. Dier 4.
Eliz. fo.
212. Nov.
Natura
Brevium,
fo. 236.
Captions in chauncerie are even at this day a piece of service alsoe, but not in soe many cases as auintientlie they ought to be taken. For it is now in a manner restrayned of *audita querela* and of *superfedeas* for the good beha- But in former times the chiefe part of this service rested *superfedeas* to writt of *capias* and exigent awarded out of the common place or king's bench; for if the parties suerties for come into the chauncery and put in sufficient caution to ap- the day prefixed in the writt issuing owt of either of ches, then had hee out of the chauncerie a *superfedeas* to life not to molest him in the meane time. And thes writts auintientlie soe well obaied, as Finchden that learned justice of such suertie in chauncery, where in the common ey used to take none in that cas then in question, but to committed the partie to prison, saieth, *coment que ceux del ont fait error, n'ottient pas à nous pour impugner leur sent que est garrant à nous*. And this healpe and releife donelie yealded to the subjects in civill causes, but in crimi- so, where men were imprisoned upon suspition of felonie ther, as appeareth both in the Register and the newe *Brevium*. But farr greater things in this behalfe are to amongst the records of the Tower. For John Britt, in fower suerties in chauncery, whoe undertooke for him boddie, that hee should appeare before the king's coun- is justices at a certaine day, and in the meane time be behaviour, was delivered owt of the Tower of London. certaine others, committed thither for misdemeanors Clerton a serjant at armes upon his report against them. Radcliffe delivered alsoe, beinge committ thither *ob sediti- in regno*. Soe was Metham and his servants delivered upon suerties for ther good behaviour, and ther owne cor- nes taken in that behalfe. Further, owt of the Fleete the Biiseley delivered, putting in suerties in chauncerie

- to retorne thither at a certaine day. The words of the
- Cl. 18. E. 3. are, *invenit manucaptos, ut causâ recreationis inde ad certum*
 2. pa. *pus exiret.* Soe was a collector, being committed by the
 of the exchequer, findinge suerties in chauncerie to appeare
 the sayed barons at a certaine day to him prefixed. Soe was
 Cl. 21. E. 3. Piet, beinge committed thither for mony by him due to the
 2. pa. whose first obteyned a writt out of chauncery directed to the
saurier and barons, *ut ipsum mandarent ad largum*; and after
 Cl. 24. E. 3. the 21st of March in the vacation time upon suertie putt in
 pa. chauncerie hee had a writt to the warden of the Fleete to
 him to goe at libertie; and both thes writts were made be-
 rant from the counsaile, but *ore tenuis* as it seemeth. La-
 Cl. 28. E. 3. Thomas Aston, beinge alsoe committed thither for debt
 kinge, upon suerties put into the chauncerie the 20th of
 to appeare before the barons *quindena pasche* was sett at liber-
 Cl. 9. R. 2. direction to the warden of the Fleete. Moreover, by such
 ties put into the chauncerie to appeare at a day prefixed
 committed to the Marshalsea have likewise been sett at li-
 Cl. 11. E. 3. So have others *capti pro venatione in forestâ bene* put into
 pa. 1. *usque adventum justiciariorum itinerantium per manucaptionem*
 Cl. 13. H. 4. *cancellariâ*; and the writts thereupon awarded were directed
 Cl. 4. H. 5. *dibus forestâ.* Furthermore, souldiers, retayned by the
 goe into his armie beyond sea, have had leave to repaire
 homes *donec dies professionis advenerit per manucaptionem*
 Cl. 36. E. 3. *cellariâ.* The like hath bene donne for ships taken for the
 service, as for example, upon manucaption in chauncerie
 the ship of John Chamber *se non diverteret, &c.* a writt was
 directed to Dantry and Applebi serjants at arms to sett the
 free, they havinge before arrested the same *pro passagio regis*
 many things, nowe dispatched in the admiraltie, were in owe
 in a more due cours donne in the chauncerie; as for
de bonis et marchandis quorundam mercatorum de Hanse
 Cl. 25. E. 3. *norum per manucaptos in cancellariâ liberandis.* And thus
 often in like sort manucaption was put in chauncerie
captis pro reprisalibus restituendis assoone as the English
 Cl. 17. E. 3. had bene satisfiied thereout. Againe, certaine marchant
 pa. 2. masters of ships *recognoverunt in cancellariâ de prestantia*
dominum regem et populum versus Burgundum
 Cl. 6. H. 5. *litteras reprisalie* which had been graunted them. Beside
 were almost noe false conductes graunted for the ships
 chants strangers, except English marchants were bound
 upon certaine conditions, (which, as I think, would be
 very necessarie to bee put in use at this daye, if they were
 and considered of) as is every where to be seene in the
 Fra. 20. 10. rolles in the time of H. 6. As in like manner upon crea-

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of transporting wolfe wheate, &c. there were first suer-
put into the chauncerie for the well usinge of the said licens.

lastlie, those, that had day given them to appeare in the
chamber, put in ther suerties for the same in chauncery. But

it is to be noted, that the masters of the chauncery did not
watch all thes things by ther owne authoritie; but in many of

ther ministrie was onlie used, and the authoritie camme
the privie counsaile; as in setting free prisoners owt of the

er or owt of the Fleete beinge commanded thither for debt
the kinge, and in discharging ships from ther arrests, and such

things which rather concerne the kinge's owen affairs then
common lawe. But when suerties or manucaptions were to

aken of what fort soever, they heald it more convenient in
time (and the same reason continueth still) to committ the

atch of them to the masters of the chauncery, whoe were
full and expert in takinge and drawinge recognifances and of

circumstances pertayninge to the same, and where the sayed
gnifances were assoone as they were entred into safelie kept

ntis amongst the king's records, then as it is nowe used to
to all kinde of clarkes and in all places, whereby it cometh

asse, that many of them are absurdlie composed and not good
lawe, and such as they are many of them also scattered and

before they come to bee kept amongst the king's records.
another part of the service was to assist the chauncellor alwaies

tealinge times; and in his absence or sicknes they had the over-
nge and direction of the same themselves, as maye be evident-

and plentifulle proved out of the records of the court. 1^o.
his was the seale delivered to Henry Clift, master of the

es, to bee kept by him, and that under the seales of Henry de
eston and Thomas de Banburgh. 30 *Januarii* was the seale

vered by the archbishop of Yorke to Edneston Bamburgh et Jo.
Pawle, three masters of the court. 6 Aprill John Archbishop of

terberry, being lord chauncellor, delivered the seale to Robert
Stratford his brother to bee kept under the seales of Edneston

St. Pawle. After the death of the bishop of London the
uncellor, the duke of Cornwall, beinge warden of the realme,

vered the seale to St. Pawle then master of the rolles to bee
under the seales of two other of the clarks *de primā formā*.

Robert Burcher, knight, chauncellor, beinge to goe to his
se in the cuntrie delivered the seale to two of the clarks *de*

primā formā to bee kept by them till his returne. Parucing lord
uncellor being sick, two of the masters of the court by his

mandement fate at the seale, and dispatched that busines.
er names were Thorsby and Broyton. Burcher lord chaun-

Fra. 10. et
36. H. 6.
Cl. 8. R. 2.
dors.

Attendance
at sealiage
times.
E. 3.
Comp.
Han.
Cl. 6. E. 3.
Cl. 7. E. 3.
de 2. pa.
Cl. 8. E. 3.

Cl. 13. E. 3.
3. pa.

Cl. 14. E. 3.
2. pa.

Cl. 17. E. 3.
2. pa.

- Cl. 15. E.3. cellor, beinge to goe unto the kinge, *quod nota*, at Norwich, the seale with Pardistow one of his owne clarks to bee under the seales of two of the masters of the court, whoe in absence opened the same divers times and sealed therewith, for time *apud hospitium unius doctorum magistrorum*, and sometime at Westminster. John bishop of Worcester lord chauncellor beinge to goe unto his bishoprick, delivered the seale to Da W. master of the rolles 2 Sept. to bee kept under the seales of Brayton and Grimesby, whoe restored the same unto him againe 8 October, and in the meane time *sigillationem praefererunt et hospitium cancellaria tenuerunt*. The archbishop of York lord chauncellor beinge to goe to his bishoprick, delivered the seale to the Woller to bee kept under the seales of Brayton and Offord.
- Cl. 27. E.3 Robert Thorp, knight, lord chauncellor, left the great seale to Adam bishop of St. Dunelm lord chauncellor, going to Calles in commission of the peace to baissinge to treat with other forraine ambassadors there, delivered the seale to William Burfall master of the rolles and John venfroe and Newenham. Soe likewise Delapole duke of Suffolke lord chauncellor, beinge to goe in ambassinge into France, left the seale the 5th of Feb. with Waltham Ravenfroe and Newenham who restored the same unto him at his returne on the 28th March; but this was donne by direction of two writts of privie seale, the one to the lord chauncellor to deliver it, and the other to the foresayed clarks to receive it. The same chauncellor, beinge to goe about his private busines to Kingston upon Hull, left the seale with Waltham master of the rolles, who received it *per literam designatam* in the presence of the clarks *tam primi quam secundi gradus*, and never opened the same in presence of the sayed clarks. 25 Martii the archbishop of Yorke, lord chauncellor, by writt of privie seale was commanded to deliver the great seale to Buxton *custos rotulorum* and Ravenfroe *custos banaperii*, whoe by another writt were commanded to keepe the same *ad sigillandum id, quod est de communi cursu cancellariae, et quod pertinet ad communem legem*; and after by another like writt of the 20th of Aprill they restored the same to him againe. Lastlie, the great seale was delivered to Wakerley *custos rotulorum* by Banfort lord chauncellor upon this reason *quod circa alia negotia adeo erat occupatus, ut sigillationi vacare non posset*.

Attendance
in parliament.

Another part of ther service is in attendinge in the high howse of parliament, whither they come without writt beinge a part of the same court. For both the parliament somoned by writts owt of the chauncerie; the acts made inrolled and kept in chauncerie; all commandements of

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are expedited, either by writs out of the chauncery, or by the chauncellor's serjants at armes; the lord chauncellor is ever maker of that howse, withowt further choice or appointment as is used about the speaker of the lower howse, and ought withowt writ to attend there, (although the contrayrie have bene used by some of the pettie bag not well instructed of the ancient manner; for what neede hath the kinge to sende notice to his seale of the attendance to those whoe have the keping of the sayed seale?) and the clark of the parliament hath his fee of the hanaper as an officer of the chauncery. The reason for ther attendance there I take to bee, not onely for the receyving of petitions; but as the judges are there, that, by observinge the words and reasons of the lords that make the lawes, they maie be more agreeable to ther meaninge expound and interpreate the lawes; soe the masters of the chauncery are there also, that they may likewise frame the writts that are to bee made upon the lawes in like correspondencie; and as the judges further maye informe the lords, howe former lawes of this realme shoulde stand touchinge any matter there debated; soe maye they bee alsoe informed by the masters of the chauncery (of which the greatest number have alwaies bene chosen men skillfull in the lawes and canon lawes) in lawes that they shall make touchinge the same matters, whowe the same shall accord with equitie, *justitiam*, and the lawes of other nations. And therefore the auncient use hath bene, that not onelie the four appointed for references of petitions, but any of the masters of the chauncery, maye take their place amonge the rest in the higher howse, as I learn of the auncient masters of the court nowe livinge.

And albeit for performance of most of the service, which hath bene formerly spoken of, the knowledge of the common lawe bee most requisite, yet undoubtedlie it was not withowt great use of reason, that auncientlie men skilfull in the civill and canon lawes have bene chosen to supplie somme of thes places. And of that matter thusse I think: forasmuch as all writings, that shoulde passe the great seale are under the governance of the lord chauncellor; but the care of composinge and examininge the appertayned to the masters, that is to say, all things that concerne the distribution of lawes amongst subjects and foreigners, the discussinge and orderinge of the king's revenewe and expence, the authentique publishinge of leagues and treaties with forraigne states and princes, in one word *omnia et singula ad expeditionem legum et bonum regimen terræ necessariâ reperiuntur*, as the words of the pament of chauncellor Preston

Jo. Searle a
master of
the chaun-
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and that of
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tent.

R. Regis
9. R. 2.

Knowledge
of the civill
and canon
lawes.

Pat. 15. R. 2.
pa. 1.

ere follow three or four words in the manuscript, which could not be read so as
the sense of them.—EDITOR.

ranne: they could not well discharge this ther office, except were indewed with soe great knowledge skill and learninge, they might informe and assist the lord chauncellor in dispatch and judginge maritime, martiall, and ecclesiasticall causes pendinge in chauncerie; the consufance of which lawes, by auntient use and fundrie statuts, appertaineth to the chauncellor. As for example, of maritime by the statutt 9. H. 5. c. 7. of 2. R. 2. c. 10. of 31. H. 6. c. 4. of ecclesiasticall by the statuts of 9. H. 6. c. 21. in some sort, but more and largelie of 25. H. 8. c. 29. and of martiall by the close of 14. R. 2. where touchinge a prisoner of warr, by appeale the constable and marshall, the cause camme to be debated determined in chauncerie. And not of thes onely but of causes determinable by the lawe merchant, there lieth appeale from maior of the staple into the chauncerie, as appeareth by the tut of 27. E. 3. c. 24. Now it is to be understood, that in cases where the lord chauncellor appointeth delegates for such causes by commission, hee maie determine the same cause he thinke good, in chauncerie himselfe, by the advise of the king's counsaile there established, or of such others of his counsailes as hee shall call to assist him, as is to be proved by records of the Tower, and the authoritie of civill and common lawes. Amongest the records it appeareth by the close roll 5. R. 2. where a maritime cause coming by appeale into chauncerie, the parties were called thither to debate the cause and it is there to be found at this marginall note, *de causa causâ appellationis faciendâ*. This rule is also gathered out of the title *de officio ejus cujus mandata est jurisdictio* in the Pandectes *quicumque delegatos dat, potest et ipse recognoscere*; for a delegate is defyned to bee, *cui committitur causa terminanda vel exequenda* *vices delegantis representans, et in jurisdictione nihil proprium habens*. And agreable hereunto saith our Bracton, *rex habet ordinariam jurisdictionem et omnia jura in manu sua, quæ ne in alium ligari possunt quin ordinaria remaneant cum ipso rege*. Nowe these things, which are donne in chauncerie, are not fayed to be donne before the chauncellor, but before the kinge himselfe, the chauncellor beinge there *loco nomine et vice regia*, as it is sayd

Lib. 1. tit. 21

Cl. Cant*.
l. 2. c. 2. de
offic. jud.

Apud
Bract. li. 2.
c. 2 §.

* The author thus shortly and obscurely referred to is *Claudius Cantiuncula*. In the book *de officio judicis* here cited, he wrote a book intituled *Paranæsis de ratione legalis*, which is included in a collection of pieces by various writers on the art of studying law, published by *Nicolaus Reusnerus* in 1588. This explanation is because *Cantiuncula* is an author rarely cited; and because the editor wishes to free others from that difficulty of understanding the reference which he himself encountered. — EDITOR.

† This reference to Bracton is erroneous. But in cap. 24. of lib. 2. in Bracton there is a passage similar to that here given in the text, though the words are not exactly the same. — EDITOR.

except turning, and; and that thes causes *peregrini juris* were not onelie
 dispatched in chancery, but pleaded there by civilians, I have partlie
 by the report of Fra. Kempt (an experrienced and discrete
 of the chauncery course) and partlie it appeareth by the
 of 7. H. 6. 11.—Touchinge the causes themselves of the
 aforeseyd debated in chauncery, I finde thes examples
 ge the records.
 Concerninge *maritime* causes.—First, certaine goods beinge ar- Cl. 3. H. 6.
 in strangers ships that were supposed to pertaine to the
 enemies, whither the kinge should have them or not, was
 debated in chancery, and not before the admirall; whereby it ap-
 peareth, that thes causes may bee brought into the chauncery,
 either by appeale, but alsoe originallie or in *prima instantia*
 presented there. Secondly, I finde a writt directed to the ad- Cl. 5. R. 2.
 mirall *de recordo et processu in cancellaria mittendo*, whereby it
 appeareth, that the chauncellor hath consuls of marine causes
 by way of evocation or *certiorari*, as hee fetcheth causes owt of
 the kinge and other inferior courts.—Thirdlie, I finde, that, when
 causes camme into the chauncerie by appellation, some-
 times judgement and execution was awarded in chauncery; as
 in the case of one Cristinus Comesson, a Hamburgher, between
 him and Englishmen abowt depredation, was adjudged in the
 chauncery, and thereupon a writt directed to the shrieve of Suf- Cl. 6 H. 4.
 folk to make restitution to the Hamburghers. Sometimes the
 chauncellor sent the cause to the justices of the king's bench, to bee
 determined; as a touchinge John Hesbite of Her-
 bert in a cause of reprisall. Sometimes thes causes by writts
 of the chauncery, were referred to the admirall; as unto
 the case of *Dorsett*, the king's uncle and admirall of England,
 who was given by such a writt to here the controversie, and to
 deliver the ship and goods, if hee sawe cause; and in the same
 case was a clause of revocation of auctoritie formerlie granted
 to Thomas Carew and others, because they at-
 tended not the saied busines. Further, I finde, that resolutions,
 by the king's counsaile in causes maritime, were expedited
 by writts under the great seale. As by such a writt *Edmundis* Cl. 9. H. 4.
Cant. admirallus noster was commaunded to deliver a Fleetish
 because it had bene before sett free from arrest *de advisa-*
consilii nostri. In like sort Thomas Branfort *admirallus*
australis was commanded to sett free a ship of Brittain,
 contrary to the truce *super altum mare per breve de privati-*
 which is soe much the more to bee observed, as being a
 thing

Pat. 1. H. 3.
16.

Cl. 3. H. 6.

Cl. 5. R. 2.

Cl. 6 H. 4.
et passim.
17. E. 3.
Cl. 1. pat.
et 19. E. 3.
Cl. 1. pa.
corr. &c. et
Cl. 9. H. 4.
Indict. co-
ron.
Cl. 25. E. 3.
1. pa.
Cl. 1. H. 3.

Cl. 9. H. 4.

Cl. 1. H. 5. thing donne *super altum mare*, which properlie appertained to the conuſance of the admirall, as appeareth by a writt of the nor ſent to him *de jure ſecundum conſuetudinem curiæ admiralis* nor ſent to him *de jure ſecundum conſuetudinem curiæ admiralis* *faciendo de navibus captis ſuper altum mare et non infra alicujus comitatûs*, as contrariwiſe hee could not arreſt any ſhip in a port withowt warrant under the great ſeale. And ſommonlie theſe warrants were not directed to the admirall, but

Cl. 36. E. 3. lie to ſerjants at armes, and ſometimes to mayors, to ſheriffes, Cl. 48. E. 3. conſtables of hundreds. For auntientlie the governance of et 50 et 51. navie, and the conuſance of marine cauſes appertained to et Cl. 11. R. 2. admirall, none otherwiſe, then the govermente of the armie the conuſance of militarie cauſes appertained to the conſtable marſhall; and that was after the kinge had begonne his journey or was at the port readie for it, as appeareth by the 15. cap. 3. and they were not auntientlie, nor are not nowe proſtiled admiralls of England (for then ſhould not the lord ſteward of the howſeholde have precedence before them) but admirall

Fra. 12. R. 2. *flotæ navium*, of which moſt commonlie there were two, one *verſus partes boreales*, and the other *verſus partes occidentales*. Sometimes one had the charge of both fleets

Fra. 12. R. 2. Ricardus comes Arundell was appointed admirall *flotæ navium Angliæ* [quod nota] *ab ore Thamisiæ verſus partes tam occidentales quàm boreales*; and ſithence the phraſe and ſtile of admirall *Angliæ* came up. Yet it appeareth, that this authoritie ſupreamme one the ſea; for Thomas de Lancaſter filius regis mirallus Angliæ by another pattent was made *locum tenens ſuper mare*.—And of marine cauſes thus much.

Concerning eccleſiaſtical cauſes, they ſeme to have bene handled in chauncery even *de vice ordinariâ* before the ſtatutts 9 H. 6.

Cl. 1. pa. 25. H. 8. for in 17. E. 3. I finde *proceſſum habitum inter Lindſey Wade de cantariâ quâdem*, and in like fort 29. E. 3. *proceſſus habitum inter cancellariâ regis inter regem et priorem de Thokeſford ſuper eccleſiâ de Coſtliam, et ſuper hoc, viſis et examinatis per juſtitiarios et peritos de conſilio domini regis hic in curiâ exiſtentibus, &c. eſt eiſdem, &c.* Another in 26. E. 3. where, in a proceſſe between John Gogh and William de Cler, *coram rege in curiâ*, touchinge a prebend, the lord chaunceller called to aſſiſt not onelie the juſtices of the benches, but the archbiſhop of

Cl. in Canterbury, and ſome other biſhops of the king's court. Laſtlie, upon a petition exhibited in chauncery by William Whorehood, the king's attorneie generall, the rectorie of St. Andrew which was in the king's hands by the vacancie of the archbiſhoprick of Yorke, and into which Thomas de Latimer had intruded, was there adjudged to the kinge, with all the meane profits ſithence the death of Edward the laſt archbiſhop of Yorke.

56 H. 8.
per cop. rec.
de lib. 2. h.
Egert. C. R.
Johanni
Purk. C. S.

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judgment is entred in Lattin, but the proceedinge therein after the English cours of the civill lawe, by examination of the parties, &c. as is used in other causes.

like examples of *militarie* and *staple* causes debated in chancerie; or beinge debated before the king's secreat counsaile, by writts out of the chauncerie: as a cause betwene the Marshall of England and the maior of London might bee Cl. 51.E.3.
 as partlie alsoe appeareth before.

which, seinge they are to bee expedited, not in cours of common lawe, but in cours of civill or cannon lawe, it was necessarie to assist the lord chauncellor with some learned in those lawes, and the distribution and dispensation of prohibitions and excommunications, was alsoe more aptlie committed to those of the chancerie, whoe understood bothe lawes, then it canne be exercised by those that are cunning in the secular lawe onely, whoe notwithstandinge have of late arrogated the same wholelie to themselves, and by an idle and obscure multiplyinge of words in imposinge of them (contrary to the auntient formes of process and consultations expressed in the register) have attained this, that the price of a prohibition, from seven shillings and pence, is risen to twice seven pounds.

like it therefore to appeare out of the premisses, that the knowledge of the common lawes, and that as Fleta sayeth, is requisit in the master, for awardinge *brevia* and *fundrie* other causes: that the knowledge alsoe of the civill lawe, which now in a manner is instead of *gentium*, and of the cannon lawe, which undoubtedlie composed by men of great learninge and understandinge, was alsoe necessarie in them to direct the course of most causes debated in the court, and to open the reason of divers causes to bee judged there, and to assist the lord chauncellor in all kinds of causes; whoe is as it were the fountaine of all the lawes exercised in England, and from whome all other lawes derive the streames of ther jurisdictions, or maye rather be compared to the ocean, from which all streames doe not flowe, but alsoe doe *refluere* into the same againe. And thus onelie, but in all things that the lord chauncellor doeth accordinge to equitie, in all orders that hee taketh for the government and direction of the court and the ministers thereof, the most convenient, that hee used th' advice and learninge of his clarks *ad robas*, being appointed to assist him as his clerks; for it often happeneth, that the edicts and decrees of the court, which are dispatched and publiquely proposed without advise and mature debatinge of ther counsaile, are suspected either *sordium* or *ambitus*. And upon this both Cicero notablie plaie and invai against Verres, Antonius,

Verrina 2.
 Philippica 2.

nius, and Dolobella, that they judged causes and made edicts on their own heads without the advise of their counsaile or assise. And surelie the auncient kings of this realme did verie rarely and unneccessarilie bestowe the charge of mainetaininge for clerks about the chauncelor, if they were to sitt idly and be exercised about him. And therefore, albeit they bee not bound to give ther advise by the formall words of ther oathe, until they be asked; yet I think it is the lord chauncelor's part to use and imploie all those heales and aides, which may support and strengthen his sentence and decrees with most vigor and authority. Add hereunto, that it will make them the more anxious and to discharge ther duties with the more alacritie, if they perceive, that lord chauncelor maketh account of ther opinions in the questions and demaunds which hee shall aske of them.

And to have sayed thusse much of the parts of ther function and of the learninge requisit to enable them thereunto suffise.

V.

It resteth to treat of the fees, allowances, and rewards, wherin inge which it seemeth the world is much changed. For before in 5. R. 2. there was a complaint exhibited against the parliament, that they were over fatt, both in boddie and purse, and over well furred in ther benefices, and put the kinge to great cost more then needed; and likewise 51. E. 3. one Theloeal would not accept the chauncellorship of the diocese of Lancaster, but with condition *quod status gradus et locum Thome integri et illasi permaneant, et quod predictus Thomas regis pro eodem gradu debitas et consuetas annuatim à camera regis pro tempore existente reciperet, et locum suum, per clericum quem cum hoc duxerit deputand. in hospitio ejusdem cancellarii nuaret.* And in those ordinances, which are tearmed de iure, it is prohibited, that any curfiter or inferior clerk of the diocese should serve as attornie in any other court, between parties, except the kinge would by his lettres pattents make him attornie generall, as if there had bene some likelihood. But from this envie, into what a state of pittie they are fallen, appereth but even overmuch. Yet let us see, what our predecessours had, the which in generalltie appeareth by *lib. 2. cap. 22.* whoe saith, that out of the proffits of the court they ought to bee founde, and that *honestè*, both for their maintenance, *pro victu et vestitu.* How this *honestè* is to be interpreted, maie partlie bee gathered owt of a booke of all the statutes in chancery composed in H. 7. his time, found by Mr.

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Pat. 22. R
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amongest Warman's papers, and nowe or late in the
of Mr. Kederman, where it's saied, that 12 *magistri, et*
quilibet, robas, vesturam, sive liberatam, annuatim, tam Diett for
quàm estivoalem, de domino rege pro se-ipsis, ac dietam di- themselves
de cancellario Angliæ pro tempore existent pro se ac uno and ther at-
aliis familiaribus suis, si voluerint eorum quilibet tres cle- tendants.
se scribentes, haberent. Agreeable hereunto are the ac-
of the hanaper remayninge in th' exchequer; in the be-
of each of which accompts are ordinarilie thes words :
domino cancellario pro expensis suis et clericorum suorum com-
500 l. For it is to bee understood, that auntientlie
s and officers of the chancery kept togeather, either in
s howse, or in some spetiall hostell appointed for them,
they had lodginge and dyet allowed them, as not onelie
things above alleadged, but by thes records followinge
proved. *Rex voluit, quòd Cliff et Helaston teneant hospi-*
clericis de cancellariâ et officiariis ejusdem; and againe,
ne Gaimsfede custode sigilli pro se ac sociis suis et aliis mini-
sterialiæ secum commensalibus, ut moris est, &c. Now that
it was not of the meanest, maie appeare many waies.
the plaint in parliament aforeseyed, for that they grew
upon. Next by the allowance of 500 l. which in thos
ould have bought as much vittaile as 2500 l. will doe
And thirddie the particulars thereof doe partlie appeare by
records, and that there were special pervaiors of the
appointed for the bringinge of the same into the hostell
chauncery. *De victualibus pro hospitio cancellariæ provi-*
Pat. 2. R. 2. Againe, *de gallinis vino et cervisiâ pro-*
pro hospitio cancellariæ. Pat. 12. E. 3. par 2^a. But
they had from the butler of England. *Rex Ricardo*
pincernæ nostro salutem: Mandamus, quòd dilecto clerico
magistro H. de Cliff custodi magni sigilli nostri vinum pro hos-
pitio cancellariæ nostræ liberetis, &c. Cl. 2. E. 3. And
R. pincernæ suo salutem: Consuetum secundum vini Mi-
Wach, ut uno custodum magni sigilli tenentium hospitium
nostræ, liberetis, &c. Cl. 8. E. 3. The quantitie of
was 12 tonnes by the yere, for every moneth a tonne,
en was delivered in spetie. But nowe the lord chaunce-
insteade thereof allowance in money from the butler of
after the rate of 20 nobles the tonne, as I take it. Be-
lodginge and ther diett, they had also robes of the
spetie, not allowance in mony for them; and that by
ry of the lord chauncellor. *Rex dilecto clerico suo Ri-*
chardo cust. hanaper. cancellariæ nostræ salutem: Quia
robaram de instanti æstate, pro clericis de cancellariâ
propter carestiam panni et sendalli,
per 7 l. et 20 d. excedit sicut venerabilis pater Johannes
episcopus

The allow-
ance of the
ambassa-
dors in
France was
13 s. 4 d.
per diem.
Cl. 5. E.
3. pa. 2^a.
Nowe it is
5 marks,
and will not
defray the
charges nei-
ther.

Robes 24.
E. 3. Cl.
12. p.

Vid. Cl. 2.
H. 5. that
then for
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was exceed-

ed 42

pounds, and
the Lord
Chancelor
had allow-
ance ac-
cordinglie.

Pat. part 1.

Cl. 35. E. R.
3. et 41.
E. 3.
Botchire.

Cl. part 3a.
Fewill.

Benefices.

episcopus Wigornie cancellarius noster nobis est testificatus; damus, quod eidem cancellario nostro dictas 7 l. et 20 d. pro dictis sic emptis de exitibus banaperii predicti solvatis, recipientes cancellario literas suas patent dictam recept. testificantes, et vobis in computo vestro debitam allocationem habere faciemus. Westminster. 12 Maii. R. E. It seemeth moreover, that the allowance for horsemeate by this recorde of 12 E. 3. de *fructu et avena pro hospitio cancellarie providendis.* But it is plain that they had allowance of botehire, and that in the best manner. *E. R. Radulpho Revenfore cancellario salutem: Mandamus vobis lib. dilectis clericis nostris primi gradus cancellarie, pro expensis bargae sue ipsos clericos a palatio nostro nastro. ubi ipsi pro negociis nostris et reipublice sessiones suas nuntur tenent, usque hospitium Episcopi Wintonie cancellarii et abinde ad propria ducentis, de exitibus finum in dicta cancellaria sine dilatione liberetis, recipientes ab eis aliquo literas suas patentes hoc testificantes, et nos inde in vestro debitam allocationem haberi faciemus.* T. R. Westminster. R. There was also fewill allowed owt of the king's for this hostell of the chauncerie; for it appeareth by the rolls that the kinge beinge at Newcastle, and Parning the chauncerie and Thoresby master of the rolles staying behinde at Northampton, there were writts directed *parciario de Milton et forestarum de Sauffe et Whitehod de busca liberanda cancellarii custod. rot.* with this clause, *sicut alii ante hac tempora habuerunt.* Besides all thes allowances from the kinge, it is to be seeneth by the yere-bookes of 28. E. 3. 3. and 20. H. 6. 8. that the benefices tiallie by the parliament rolle of 4. E. 3. * that rectours and other ecclesiasticall benefices rated 20 marks or under of the king's gift were principallie distributed amongst them, and the other upon the other clarks of both the benches and the exchequer. *consilium et assensum magistrorum.* But Wolsey, as they say, changed it to all benefices under 20 l. and now they are *sine assensu et consilio magistrorum.* And thes I take to be

* The words of the clause in the rolle referred to are,

" Pur ceo, q'en temps dount memore ne court, fust ordeine et per les prelatz nostre seigneur le Roi, que les chauncellers, que pur le temps serroient, les benefices que appendoient au Roi a donner, del tax de vint marcs et de cent, les clerics de la chauncellerie, que longement avoient travayle en la place, chose ad este use du dit temps, tanque l'evesque de Nicol fust fait chaunceller, dona en tut son temps les dites benefices a ses clerics, encontre la volonte de nostre seigneur le Roi, et encontre les ordinances et usage avandites: pleise au seigneur le Roi et a son conseil ordeiner, que les chauncellers, les temps serrount, doynent les benefices, que a eux appendent a donner, avaundite, a les clerics de la dite place, sicome a aunciennement ad este use." ceo soit fait par election de les mestres de la chauncellerie.

" Soit ceo bille livre au Roi, et semble au conseil, q'il doit commander au celler, q'il desore doigne tieux benefiz as clerics le Roi de la chauncellerie, chequer, et des deux baunkes, et ne mye as autres." See Roll. Parl. 4.

54.—EDITOR.

of the certaine rewards, which the clarks *de 1^o. formā* in the prince for extraordinarie paines or longe continuance in the place; or beinge extraordinarilie qualified, they were be extraordinarilie rewarded with somes of mony, penfions of licenses, and of wyne from the butler of England with preferment to higher places, of which I have many presedents in perusing the rolles of the chauncerie. Amonge ther fees from suitors to the court, those that are are thes followinge. For knowledinge of deeds, for releases of all kindes, as dett, baile, manucaptions for shreifs, for liverie and removinge of extents, for writts *de non assis*, for oathes taken in the office of alienations, the two shillings; for an ordinarie affidavit 4d. and they are to have a fee of 6s. 8d. for cancellinge of pattennts, now amongst other things is taken away alsoe. And of the residue, the greater part of the ordinarie masters of the court have little or nothinge. And insteade of ther robes, which were to be delivered them in specie, the one furred, the other with tafita [for soe the words of the recorde runne, *fur fura* in winter, *et pannus et sandallus* in somer] there was paid in mony for both 6l. 14s. and yet certaine deducti- on of that alsoe to the clark of the hanaper's man. Soe appeareth, that, whereas in auntient time our predicesors had meate, drink, fier, appairell, attendance, passinge benefices or pensions, and many ordinarie fees; nowe our successors enjoye little or nothinge thereof, and yet our attendance is greater then thers was.—Let us therefore consider, whither there bee any probabilitie of recoveringe of thos things which wee have lost, and the meanes

of a suite three things are espetiallie to bee considered: the matter it selfe, the person by whome, and the manner

of the matter I take it to bee worthe the laboringe in, wherein doeth consist the restitution of the credit and that was auntientlie annexed to our places, and somme recompence for extraordinarie paines, that wee take in our predicesors. As for example:—In matters of precedence betweene us and serjeants at lawe debated and settled; and concerninge the clarks of chancerie, to seeke to renewe the dependance of the cursiters and six clarks upon us.—In matters of the fees of writts that be *magistralia* or of grace answered unto us, and likewise the writinge of exemplifications to have the grant of the chancery suppenas *in cursu*, because of the trouble that groweth by thos suppenas cometh to us, and others have all the profit: to have the examination

ation of pattents by the privie seale as incident to our place now enjoyed by an absurd grant : the writinge of committments, appeale, and the compulfarie proces thereupon, because matters might bee heard in court : and the keepinge of records in the Tower : the clarkship of the parliament proposed to one of our company, as auntientlie it was wont to have the takinge of reconufances upon bills to be put in court according to the stattuts thereof made still in force, otherwise to have somme stipend from the prince, or from the partie, for our hearing and reports, seinge *nemo miles reipublica* ; and that all others in the realme have ; soe that *tolus* faieith, *duo aurei debentur in initio cause, et alii* during that the *Miroer des Justices* assigneth twice as much to us as to the counsailler, that commissioners in spetiall assises were allowed them by the auntient lawes and usaiges of this realme, and that the manner in France is in such cases to have *des espices* *.

Touchinge the person by whome, seinge our places are in the gulf of the lord chauncelor, and that some of them have withdrawen a great part of our credit and profit, are not in his gulf, here is hope of doinge good, if an opportune time be chosen for the same ; for not onelie the intercession to the prince somme reasonable allowance may be secured that way for us, but out of his owne authoritie dispose many things unto us.

Touchinge the manner, I suppose the greatest point to be to consider by what steps wee are fallen, and to seeke by the same againe. Nowe I take it our fall grewe by beinge *arena sine calce*, by fallinge asunder one from another neglecting the common ; and in the meane time those before our inferiors, by getting themselves incorporated, appeared before us in profit exceedingly, and in trewe as well as alfoe regardinge *potestatem juvandi nocendive*. Mr. Lambardinge this point was verie earnest to have us suitors for incorporation to her majestie. I was rather of opinion, that our number is tearmed in E. 3. time *numerus dividendus* were better to stick to our auntient prescription, then to be in underneath our inferiors as a puifne corporation. So we may remaine at libertie to impugne things by them inroaded upon us, which by acceptinge a newe corporation wee shall be forced to doe. Again, this wee may doe of ourselves, when

* Auntiently it was the custome in France to give a present of spices to the judges on their making a decree. This present afterwards grew into a tax, and it is still payable to the judges there by the name of *épices*. See the *Collection des Decis. Nouvelle par Denifart*.—EDITOR.

will be delay difficultie and incertaintie. Therefore if halfe of us would beginne a newe inne of chancery, and kept commons togeather in the tearme time, I thinke our charge would not bee increafed; and upon this foundation there growe order for attendance in court among ourfelves, unto us from others, which wee nowe want by beinge amongest others, and an ablenefs to performe the service of the court the better by our conference. And, as I fayed feinge our places are in the chauncellor's guift, time would on to us one thinge after another. Wherein I would wifh ours to be holden, that we fought at first rather to renewe reforminge of our dueties without gaine, then over-eagerlie fue our gaine at the first; and I think God would bleffe proceedings the better. As for example, wee might appoint sessions, such as our prediceffors were wonted to holde, all bills of costs might bee taxed in the prefence of the es on both fides. There by motion of the attornies alsoe orders be granted by us *de preparatoriis ad iudicium*, where-client's charge might bee saved for his fees both to coun- and register. The writers of petty bagg would there be and the bagg sealed with one or more of the masters all exemplifications and pattents might there be examined, ffioners for *dedimus potestatem* and for examination of wit- might there be nominated, and other things of thes kindes dispatched; and this would bee a good meane of renew- our auntient superioritie over the inferior clarks of the and breede a regard in them towards us. If thes things huffe once begoune, then might we treat and endeavor the rage of our auntient rightes, or recompence for them, with credit and reputation, with more commoditie in consulta- and more readines of contribution; without which thes I doubt will not be effected.

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I.

TWO PIECES

CONCERNING

WRITS IN CHANCERY

BY

SUBPOENA.

A replication of a Serjaunte at the Lawes of England, to
 Wyne Pointes alleaged by a Student of the said Lawes of
 England, in a Dialogue in Englishe between a Doctor of Divi-
 nity and the said Student.

A little Treatise concerning Writs of *Subpœna*.

These pieces are printed from a manuscript in the Cottonian library at
 British Museum. See Cott. MSS. Cleopatra A. 15. The title
 beginning of the manuscript is, "A Treatise concerning Sutes
 in Chancery by *Subpœna*;" to which is added the following

founde amongste the bookes of Sir Edward Saunders, late cheife
 justice of England, and after cheife baron of the exchequer,
 and noted by his hande writinge to be entituled on the outlyde,
The Dialogue betweene a Serjaunte at the lawe and Christopher
Seinte Jerman; and on the inside, *The Answer of this Treatise*
by Christopher Seinte Jerman."

These pieces were clearly written in the reign of Henry the 8th,
 after the first edition of the DOCTOR and STUDENT, which I
 have been first printed by John Rastell in 1523. See Ames's
 Account of Printing, 145.]

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S U B P O E N A.

P A R T I.

followeth a Replication of a Serjaunte at the
res of England, to certaine Pointes alleaged by a
gent of the said Lawes of England, in a Dialogue
Englishe between a Doctor of Divinitye and the
Student.

SERJAUNTE of the lawe of England, hearinge the com-
munication and dialogue between a doctour of divinitye
student in the lawes of England, saith to the doctour in this

Doctour, after my mynde ye have righte well declared di-
vers, that is to say, the lawe eternal, the lawe of reason, the
God, and the law of man. And you, Mr. Student, have
well shewed, howe the lawe of England is grounded uppon
the lawe of reason, and have shewed your mynde therein righte
against which I entend not to repile. But mine entent is,
Student, to repile againste your opinion in one point in a
question asked of you by Mr. Doctour, which is this*. If a man
be bound in a single obligation to paie a certayne summe of money
to the obligee, and the obligor payeth the money at the
time appointed, and taketh none acquitaunce, neither the obligation wherein
he is bound; and notwithstandinge this he that hath the obliga-
tion taketh an action of debte upon the saide obligation againste
the obligor; ye have saide, that in this case the obligor hath no re-
medy by the common lawe at the realme, and ye have shewed the
same righte well, as it appeereth by your declaration, the which
I do not rehearse. But ye say farther in this case, that the de-
fendant

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* See Doct. and Stud. dial. I. ch. 12. EDITOR.

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 defendant may be holpen by a *subpœna* in the king's chauncerie to that I intend to repile. Notwithstanding I shall first move you, that in this case after my mynde the defendant have remedie at the common lawe. For after this payment the defendant bringe an action of debt against the obligee and upon a prompte, if the obligee will plead that he receaved said money for the contentacion of his obligation, this pleaded in court of recorde shall discharge the obligor of the said obligation; and if the obligee will wage his law, then the obligor without remedie; and yet he is at no greater mischeif than he should be, if he had lent him the money without writing. In which case, if the defendant wage his law, the plaintiff has remedie in the common lawe, nor yet in the chauncerie by his wager of law. I thincke, that in this case the obligee may wage his law and discharge his conscience. For when a man is bound in a single obligation, there is a condition implied by the lawe, that this obligation cannot be discharged but by matter in writinge, or by matter of recorde. Than if the obligee wage his lawe, thincking that it is a satisfaction of his obligation that is not so; for the obligation cannot be discharged by matter in writinge or by matter of recorde, and so he cannot discharge his lawe and discharge his conscience after my mynde: but he must pleade in courte of recorde that he receaveth it in satisfaction of his obligation, and than the obligor shall be discharged or els he must repay the money again, or els he cannot discharge his conscience. Nowe to that ye say, that this obligor may be holpen by a *subpœna* in the king's chauncerie. As to that after my mynde, that it standeth neither with the lawe of God, neither with the lawe of God, ne yet with the common well realme, that this man shold be holpen by a *subpœna* in the chauncerie. First it is not reasonable, that for a particular manner which hath hurte himselfe by his own negligence and by his folly, that the good common lawe of the realme (which is answered but by matter in writing or by matter of recorde) may be made voyd or be set at nought by the suite of any particular person made in the chauncerie or any other place. But information be had in this case in the said chauncerie by a *subpœna*, must needs follow, that this good common lawe must be voyde and set at nought. For by a *subpœna* the plaintiff is permitted to sue the common lawe, and is compelled to make answer in the chauncerie, where the obligor shall be admitted to pleade a defence of the debte containyd in a single obligation without writinge, which is cleane contrarie to the common law; so that if that be

the common lawe that is contrary to this must needs be
 we. For these two lawes, one being contrarie to the other,
 stande together, but one of them must be as voyde.
 before it must needs followe, that, if this lawe be main-
 tained in the chauncery by a subpœna, the common lawe, which
 is contrarie to that, must needs be as voyde and of none effect.
 I will moche what authorite the chancellor hath to make such
 a writ to let the kinge's subjects to sue his lawes, the which
 the kinge himselfe cannot do rightewislye; for he is sworne the
 kinge, and it is sayde, *hoc possumus quod de jure possumus*. Also
 the king's judges of this realme, that bee appointed to minyster
 the lawes of his realme be sworne to minister his lawes of the
 lawe indifferentlye to the kinges subjects; and so is not the
 chancellor. Also the serjaunts at the lawe be sworne to see the
 king's subjects to be justified by the lawes of this realme determi-
 ned by the king's judges and not by my lord chauncellor. Yet
 notwithstandinge, if the kinge's subjects, upon a surmised bill
 to the chauncerie, shal be prohibited by a subpœna to sue ac-
 cordinge to the lawes of the realme, and be compelled to make aune-
 tement before my lord chauncellor, than shall the lawe of the
 land be set as voyde and taken as a thing of none effecte, and
 the king's subjects shall be ordered by the discretion of the chaun-
 cellor and by no lawe, contrarie to all good reason and all good
 lawe. And so me seemeth, that such a sute by a subpœna is
 contrarye against the law of the realme, but also against the lawe
 of reason. Also me seemeth, that it is not consoformable to the
 law of God. For the lawe of God is not contrary in itself, that
 is, one in one place, and contrary in another place, if it be
 perceyued and understood, as ye can tell, Mr. Doctour; but
 the lawe is one in one courte and contrarie in another court.
 Also me seemeth, that it is not onlie againste the lawe of the
 land, and againste the lawe of reason, but also against the
 law of God. Also me seemeth, that this suite by a subpœna is
 contrarye to the common well of the realme. For the common well
 of the realme is to have a good lawe, so that the subjects of the
 realme maie be justified by the same, and the more plaine and open
 the lawe is, and the more knowledge and understanding that
 the subject hath of the lawe, the better it is for the common well
 of the realme; and the more uncertaine that the lawe is in any
 place, the lesse and the worse it is for the common well of the
 realme. But if the subjects of any realme shall be compelled to leave
 the lawe of the realme, and to be ordered by the discretion of one man,
 then maye be more unknowen or more uncertaine? * But if
 this

secundum literas et leges, et non secundum propriam mentem judicare.

Aristot. in Polit.

this manner of suite by a subpœna be maintayned, as y^e Student wold have it, in what uncertaintie shall the kinges subjects stande, whan they shall be put from the lawe of the land and be compelled to be ordered by the discretion and conscience of one man! And namelie for as moch as conscience is a thing of great uncertaintie; for some men thinke that if they treade two strawes that lye acrosse, that they ofende in conscience some man thinketh that if he lake money and another he thinketh that he may take part of his with conscience; and for some men divers conscience; for everie man knoweth not what conscience is so well as you Mr. Doctour: so me seemeth, that the kinges subjects be constrayned to be ordered by the discretion and conscience of one man, they shold be put to a greates uncertaintie that which is against the common well of a realme. And so it seemeth, it is not onlie against the common lawe, but also against the lawe of reason, againste the lawe of God, and againste the common well of this realme.

STUDENT. Howe is it than, that the chancellours of England have used this?

SERJAUNTE. Verelie I thincke for lacke of knowledge and goodnes of the lawes of the realme; for moste common chancelours of England have been spiritual men, that have but superficial knowledge in the lawes of the realme; and soche a byll hath been made unto them, that soche a man may have greates wronge to be compelled to paie two times for the thinge, the chancellour, not knowinge the goodnes of the common lawe, neyther the inconvenience that mighte ensue by faide writ of subpœna, hath temerouslye directed a subpœna against the plaintiff in the kinges name, commaunding him to cease before him in the chauncerie: and he regardinge no lawe but trustinge to his owne wit and wisdom, giveth judgment as pleaseth himselfe, and thinketh, that his judgment being in his own authoritie is farre better and more reasonable than judgment be given by the kinges justices according to the common lawe of the realme. In my conceite in this case I may liken the chancelor, which is not learned in the lawes of the realme, to him, that stands in the Vale of White-horse farre from the horse, and holdeth the horse; and the horse seemeth and appeareth to him a goodly horse and well proportioned in every point, that if he come neere to the place where the horse is, he shall see that he ceave no horse nor proportion of any horse. Even so it is by my lord chancelor that is not learned in the lawes of the realme; for whan such a bill is put unto him, it appeareth to him to be a matter of great conscience and requireth reforme, and the matter in the bill appeereth so to him, because he

the understandinge and the knowledge of the lawe of the
 and the goodnes thereof; but if he drawe neere to the
 ledge and understandinge of the common lawe of the realme,
 that he maie come to the perfecte knowledge and goodnes of
 shall well perceiue that the matter containd in the bill put
 in in the chauncerie is no matter to be reformed there, and
 lie in soche wise as is used. Moreover, Mr. Student, I mar-
 moche, that ye say that men that have wronge maye be holpen
 any cases by a subpœna, in so moche as you have in your
Brevium severall writts and divers natures for the reforma-
 of everie wronge that is donne and committed contrarye to
 wyes of the realme; and amonge all your writts that you have
 your *Natura Brevium*, ye have none there called a subpœna,
 yet the nature of him declared ther, as ye have of all the
 specified in the faide booke. Wherefore me seemeth it
 not with your studie, neither yet with your learninge of
 wyes of the realme, that any man that is wronged should have
 remedie by a subpœna. If a subpœna had been a writ ordain-
 in the lawe of the realme to reforme a wronge, as other
 in the faide booke be, he shold have bin set in the booke of
Brevium, and the nature of him declared there, and for
 reformation of that wronge it layeth, as it is in the writts con-
 d in the faide booke: and for as moche as it is not so, it is a
 abused in my mynde contrarye to the common lawe of the
 re, and contrary to reason, and all good conscience, and yet
 ured by the pretence of conscience. But it fareth by that,
 doth by other vices, *quia vitia aliquando mentiuntur se esse*
bona; for vice at some tyme will untrulie counte itselfe to be
 good, as pride at some tyme will shewe himselfe to be meeke and
 kinde moche humility to have his pretended purpose. And
 this writ of subpœna is colour of conscience to have that he
 not to have by the lawe of the realme, nor by the lawe of
 God, nor yet by the lawe of God as I thincke, and by all pre-
 of conscience. Mr. Student ye speake moche of conscience,
 you move a question whether conscience shall be ruled
 by the lawe, or that the law shall be left for conscience.
 I thincketh that the lawe ought not to be left for conscience in
 all: for the lawe commaundeth all that is good for the com-
 wealthe to be donne, and prohibiteth all things that are evill
 againste the common weale. Wherefore if ye observe and
 the lawe, as in doinge all thinge that is for the common weale,
 shewe all thinge that is evill and againste the common weale, ye
 not neede to study so muche uppon conscience; for the lawe of
 the realme is a sufficient rule to order you and your conscience what
 all do in everie thinge, and what you shall not do. If ye therefore
 follow

follow the lawe truly, you cannot do amisse nor offende your conscience; for it is saide, *quodd implere legem est esse perfectè virtutis* to fulfil the lawe is to be perfectlie vertuous.

STUDENT. That is to be understood by the lawe of God.

SERJAUNTE. It is also to be understood by the lawe of man for the lawe of man is made principallie to cause the people to follow the lawe of God; and some seemeth, that if ye followe the lawe of the realme truly, ye shall not neede to leave the lawe of conscience.—Moreover, ye speake moche of conscience, and manie cases concerninge conscience; and though lawe will wether it will stand with conscience. For me to repile and answer to everie one of your cases, it weare too tedious, and not myne intente. But myne intent is to moove you to your studie principallie to have the verie and true knowledg of the lawes of the realme, and that had and knownen to practise the same truly without any craft or subtile invention; and that shall not neede to speake so much of conscience. But I perceive by your practice, that you leave the common lawe of the realme and ye presume moche uppon your own mynde, and thincke your conceit is farre better than the common lawe; and upon ye make a bill of your conceite, and put it into the chancery sayinge, that it is grounden upon conscience; and so ye leave your conceite in argument in the chancery, and leave the common lawe as it weare a thinge of no goodnes, ne of no reputation in the which practice me thincketh you moche abuse yourselfe though my mynde be not to repile against every of your cases. My mynde is to repile against your sayinge in your answer made to a question demanded of you by Mr. Doctour in the end of the 21st chapter, in your second dialogue. And the question is this, to knowe howe uses beganne, and why so many landes hath been put in use? To the which question ye make sweare in the 22d. chapter than next followinge, sayinge, uses weare reserved upon a secondarie conclusion of the lawe of reason, as ye have declared in the same chapter. I saye for correction and reformation of my lordes and maisters the lawe of the lawe of this realme, that they began of an untrusty craftie invention to put the king and his subjects from that they ought to have of righte by the good true common lawe of the realme: as the kinges highnes from his escheats, his wardes and his primer feoffments, and from other things that nowe cometh not to my mynde; and his subjects from their escheat wardes, women from their dowers, and the husbandes of women that be inheritoures from their tenures by the

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of England, the which they ought to have by the lawes of
 realm; and those that have good right and tittle to any land
 recover it by action after the course of the common lawe be
 from their actions, and if they bringe their actions to cause
 delaies that they shall never have recoverie. And though
 of these inconveniences be holpen by divers statutes, as ye
 saide, yet ther rest manie and great inconveniences more
 can rehearse at this time that be not remedied; and in
 all one, and that is this. By soche uses the good common
 of the realme, to the which the kinge's subjects be inherite,
 inverted, and made as voyde, so that none of the saide sub-
 can be and stand in anie surety of any possession. For if
 time and proove his tittle by a deed of feofment, the other
 will say he was but a feoffee of truste; and if he clayme
 fyne or by a recovery, he will say likewise that he was of
 so that neither deede, ne fyne, ne yet recoverye, which
 men's titles by the common lawe, maketh or enforceth any
 title at this daye; and all because of this false and craftie
 of uses as I thincke. To proove that it beganne upon
 truth and false purpose, it appeereth by that, that he, which
 sh soche a feofment, faith and doth one thing and thinck-
 another thing cleane contrarie. For he sayeth by his worde
 by his deede, and writinge, and liuerie and seasin, that the
 shall have the land to him and to his heirs; and his mynde
 intent is, that he shall not have it, but he will have it him-
 self. What a falsenes is this to speake and do one thing, and
 do another thing cleane contrarie to the same! Every man
 perceave in my mind, that of this can come no goodnes,
 chaste and falsehood. And so mee seemeth, that these uses
 by an untruth and craftie invention, and are continued
 untruth and for a deceite; and yet do ye, that be stu-
 of the common lawe of the realme, maintaine this untrue
 craftie invention in the chauncery by the colour of conscience,
 to the studie and learning of the common lawe, and
 try to reason, and also to the lawe of God. What reason
 that if I give you my lond with all the circumstances that
 to a guifte of land by the lawe, or levie a fyne or suffer a
 ry against me, and yet I to have the disposition of the
 myselfe! So that it appeareth in my mynde, that these uses
 by an untrue and craftie invention, and is maintained in
 chauncerie by the colour of conscience, to the subversion
 good common lawe of this realme, againste all reason, and
 to the lawe of God, which teachethe nothinge but
 not only to the exprefs wronge and hurte of the king's
 and of all his subjects, but also as moche as in them
 is

is to bringe the kinge's highnes to the detestible offence of
 rie, as it appeereth by a statute made the 20th yeare of
 Edward the 3d*, wherein is contained as heere followeth.

“ Edward, by the grace of God, &c. to the sheriffe of
 “ ford, &c. greetinge. For that, that by divers plaintes ma
 “ us wee have knowlege, that the lawe of this lande, the
 “ we be bound by our oathe to maintaine, is not well kepte
 “ the execution of it disturbed manie ways by maintenaunce
 “ procurement as well in courte as in countrie, wee, m
 “ greatlie in conscience of this matter, and for that cause
 “ ring, as well for the pleasure of God and ease and quiet
 “ our subjects, as for the savinge of our conscience and for fa
 “ and keepinge of our oathe aforesaid, by the assente of
 “ lords and other sage wise men of our counsel, have ord
 “ and comaunded expresse to all our justices, that they sh
 “ egall lawe and execution of right to all our subjects rich
 “ poore without having regard to any person, and not to
 “ to do righte for any letters or comaundements that maye
 “ from us or from any other, or for any other cause wha
 “ it be; and in case that any letters writs commaundements
 “ to the justices or to their deputies to let the lawe and
 “ after the usage of the realme in disturbance of the lawe
 “ the execution of the same or of right to the parties, the
 “ justices and other aforesaide shall go forth and holde
 “ courtes and their processe where their ples and busines
 “ pendinge before them, as though no soche letters w
 “ commaundements weare come unto them, and they to
 “ us and our counsell of soche commaundements, which be
 “ trarie to the lawes as is abovesaid. And to the ende th
 “ justices shall do egall righte to all men in manner as is
 “ said, without shewinge more favour to one than anothe
 “ have caused our saide justices to sweare, that they shall n
 “ from hencefoorth as longe as they be in office see or li
 “ no man but of ourself, and that they shall not take gra
 “ reward themselves ne by other privelie ne openlie of
 “ that shall have to do before them by any manner of wa
 “ cepte it be manger and boyer, and that of little value
 “ that they shall give no counsell to greate nor to small
 “ wher wee be partie, or that toucheth us or may touch
 “ any pointe, upon payne to be at our will both bodie and
 “ and to do our pleasure in case that they do the contrary.
 “ for this cause we have encreased the fees of our just
 “ soche a manner as it may reasonablye suffice them.”

* Lord Coke denies this to be a statute. See 3. Inst. 224. 146. For

that ye may perrceave by this statute, that my lore chauncer nor none other ought to send any writ or writinge to any es to let them to proceede accordinge to the common lawe of the realme, the which lawe the king is bound to set mayn- tain, as it appeereth by the said statute. And all is one mis- take to sende a writ, or a commaundement to the partie that he not proceed to sue the common lawe, as it was before the mak- ing of the said statute to sende it to the justices; so that the send- ing of such a writ or commaundement cannot be justified no more one than in the other. Notwithstandinge it is commonlie knowe, so that the common lawe of the realme is taken for no- thing, but all the lawe that now is used is to determyne what is con- science, and which is no conscience, and so the common lawe of the realme is now adaies by you that be students turned all into conscience, and so ye make my lord chauncellor judge in everie case and bring the lawes of the realme in soche an uncertaintie that no man can be sure of any landes be it inheritaunte or pur- chased, but every mannes title shall be by this meane brought in question into the chauncerie; and therefore it shall be tried whe- ther be conscience or no conscience, and the lawe of the realme, which we ought to be justified, nothing regarded. And so in this case after my conceite, if this not be reformed by the great wisdom and policie of my lords and maysters the judges of this court, the lawe of this realme will be undone, and all by the means of these uses and the craftie and subtile inventions that ye students make upon the said uses.

PART

P A R T II.

Heereafter followeth a Litle Treatise concerning
of Subpœna.

Whether a subpœna ought to lye in any case.

The FIRST CHAPTER.

IT appeereth in the kinge's chauncerie in the tyme of so
noble princes and kinges of this realme, and in the tyme
manye of their chauncelors, whereof some have bin spirituall
and some temporal men, that so manye have bin put to answer
upon writs of subpœna in the chauncerie, that it is not to be
sume, that the chauncelors have directed them temerousslye
king's name without authoritie, but rather by good autoritie
by commaundement of the kinge and his counsil, and by
ledge of all the realme. For els it were rather to presume
they should longe before this tyme have utterlie bin
and put awaye; and because they have bin suffered to continue
so long, it is to suppose, that in some cases they may be
awarded. Also it appeareth in divers years of termes, that
nye times when the chauncellor hath bin in doubt in
that have depended before the king in his chauncerie upon
pœnas between partie and partie, that he hath asked
the justices, some time whether a subpœna lay in the
not, and some time admittinge that the subpœna hath lyen
case, a doubt hath arisen upon matter that the defendants
pleaded in barre of the subpœna; and manye times the
in soche cases determined, that a subpœna hath lyen, and
time have reasoned to the doubt that hath risen between
parties admittinge the subpœna to lye, and so hath the
daunte donne and all his council; and there be so man
reported thereof, that it needeth not to recite them here
by the statute made in the 17th yeare of the king R. the 2d
enacted, that a man wrongfully vexed by a subpœna shall
ver his damages by advice of the chauncelor. And in a
made in the 15th yeare of the kinge H. the 6th. it is enacted
that no subpœna shall be graunted till suretie be founde to
the partie grieved of his damages, if the matter in the bill

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ed true. By which statutes it appeereth, that in case that
 defendant be righteously vexed in the chauncerie, and be sued
 a true cause, he shall recover no damages; and thereby
 eth that they that weare of the parliament at the makinge
 said statutes assented, that in some cases a man mighte be
 ussly sued in the chauncerie, and that they intended to
 diversitie of the recoverie of damages, whether he was
 ussly sued and whether not. And if it be said it is against
 statute of the 2d. and 20th. of E. 3. and also against diverse
 statutes, which will, that the justices shall not surcease to
 for the graunde seale, or privie seale, nor for none
 commaundement of the kinge, it maye be aunswared, the
 are to be understood, wher suche commaundement is di-
 to the justices, that they shall not therefore surcease to do
 ; but a subpœna is alwaie directed to the partie and not
 justices, whether there be any suite hanginge thereon in
 art or not, and than whan the partie by reason of the said
 on surceseth to call upon the justices for any more processe,
 ces also to give it him : but if the mination weare deli-
 to the justices, commaunding them to cease, and notwith-
 ge the partie calleth for justice, there I thincke the justices
 und by reason of the said statutes to proceede and to do
 the said mination notwithstanding. And me thincketh,
 all these things well considered, no man oughte to mervaile,
 authoritie the chauncellor hath to make soche a writ of
 na in the king's name; for the old custome not restrayned
 statute, warraunteth him by reason of his office so to do,
 certaine groundes, and under certaine manner, as I shall
 touche heereafter in this litle treatise, to give other occasion
 ke further therein hereafter.

*followeth one consideration, whie it hath been thoughte
 reasonable, that a subpœna should lye.*

The SECOND CHAPTER.

HERE is a ground in the common lawe, that a declaration
 must be certaine; specialle that it must shewe, who bring-
 action, against who it is brought, and what thing is de-
 ed; and most commonlie it must shew also the daye and
 whan the cause of the action began. And because it hap-
 neth

neth manye times, that some manne, that hath righte to landes that be in another manne's hande, and that neyther under lock nor seale cannot shewe the verie certaintye of manie deeds there be, or if it be but one deede, yet he cannot tell the name of him that made the deede, nor to whome it was made, ne peradventure the certaintye of the lande comprised therein, nor all the towne's names where it is, wherefore he is without remedie by the course of the common lawe; there it hath bin thought reasonable in tymes past, that a subpœna should lie for him that hath righte, and rather to compele him to have righte there, than to leave him without remedie in such places. And this is one of the moste common cases where a subpœna hath bin sued in times past. And here it is to be noted that it is not against the common lawe; tho' the party have sued in the chauncery in the said case, though he can have his righte at the common lawe. For the common lawe doth not prohibit that ther shall be remedie in the chauncerie in the said case, or in any other like; and if it did, it wolde be harde to proove that such prohibition were reasonable. Wherefore the reasonableness of the common lawe doth suffer it, rather than, it would breake his rule of the groundes, and to suffer the plaintiff to have an action, and to declare nor shewe whereof he brought his action.

Another consideration why it should seeme reasonable, that a subpœna should be graunted.

THE THIRD CHAPTER.

THERE is a maxim in the lawe, that a rente, a commonuitie, and soche other things as lye not in manuel occupation, may not have commencement, ne be granted to none without writing. And thereupon it followeth, that if a man sell a certaine summe of moneye for another forty pounds of rente to be perceived of his landes in D. &c. and the buyer thinke that the bargaine is sufficient alkeith none other, and after he maundeth the rent, and it is denied him, in this case he hath no remedie at the common lawe for lacke of a deede; and this is as moche as he that solde the rent hath *quid pro quo*, that he shall be holpen by a subpœna. But if that graunte had bin made by his meere motion without any recompence; ther he to whom the rent was graunted should neither have had remedie by the common lawe nor by subpœna. But if he that made the sale of the rent had gone farder, and saide, that he before a certain

make a sufficient graunte of the rente, and after refused to there an action upon the case shold lye against him at the lawe; but if he made no such promise at the makinge of the contracte, than he, that bought the rente, hath no remedy but by subpœna, as it is saide before. And the same which is of a rente that had no beinge, but is solde as a newlye to beginne by the sale, is of a rente that had beinge, and is solde without deede for a certaine recompence, as is rehearsed.

For consideration why it hath binn thought reasonable, that a subpœna shold be graunted.

The FOURTH CHAPTER.

The statute, that is called *Quia emptores terrarum*, it is enacted amonge other thinges, that it shall be lawful for every free-tenement to make a feoffment of his landes or of parte of his lands to whom he will, so that the feoffee holde alwaie of the chiefe lord of the fee. By reason of which statute if a man sithe that he made a feoffment without deed or by deed polle reserving a rent, that reservation is voyde as for any remedye that ye shall have by the common lawe. And so it is if a man being seased for terme of life graunte over his whole interest without deed or by deede polle as is aforesaide reserving a rent, that reservation is voyde in the lawe as for having any remedie by the common lawe; for there is a maxime by the lawe, that a reservation of rente shall not stand in effect, unles he that maketh a reservation have a reversion in him, or else that the lande may be holden of him by that rent reserved as it mighte have bin before the saide statute of *Quia emptores terrarum*: and therefore it cannot be holden of him, because of the saide statute, whichinge also that he hath no reversion in him, therefore for reservation he shall have no remedie in the courtes of the common lawe, as in the kinge's bench the common place and courtes of lower autorite than they be. And the very reason why it is so is, because the maximes and customes of the lawe hath given no remedie in that case; for tho' a man have a reservation by the lawe, yet some time he shall have no remedie by the lawe, but it is as voyde as for any remedie he shall have at the common lawe as is aforesaide, but yet is good by the lawe of equity. For reason will, that, for as moche the entente of the statute was that the rent shold be paide, and that the feoffee take the

the land to the same entente and hath the profits of it, he shall paie the rent according to the agreemente. And if any man saye, that this reservation is voyde to all ententes, because againste the lawe, for if it be againste the lawe either it is or else the lawe is voyde; and therefore if a statute were that all reservations of rentes out of landes should be void, than a man contrarie to the statute wold make such a reservation, that reservation were voide in lawe and conscience, were directlye againste the statute; and that it should be likewise in this case: to that it may be answered, that the voyde in that case, yet it is not like in this case. For in this case there is no lawe, that prohibiteth for the reservations made, but if they be made the lawe judgeth them by the force of the lawe of the realme, that there shall be no remedie for them by the common lawe as it is sayde before; but taking the lawe of the realme to be grounded as well upon the lawe of reason and the lawe of God as upon the said customes maxims and statutes, as it is indeede, for els it weare a verie grosse lawe farre insufficient, and also againste reason in manie things, is the reservation good in the lawe of the realme. So generally taken upon all his grounds, howbeit that yet in that case there is no remedie for that that is reserved in the king's court by the common lawe, as is sayde before, but yet the lawe is not againste it, but that remedie may be had therefore in the chancery.

*Another consideration why it should seeme reasonable,
subpœna should be granted.*

THE FIFTH CHAPTER.

THERE is a maxime in the lawes of England, that if a man bringe an action of debte upon an obligation, the defendant shall not be receaved to pleade *nihil debet*, that he oweth nothing, but that he shall be compelled to pleade an acquittance or some other thinge of as high nature in the lawe as the obligation is, of that it followeth, that if a man that is bounde in an obligation that money and taketh an acquittance and after leeseeth the same, and thereupon the obligor bringeth an action of debte by the obligation againste the obligor, in this case the obligor hath no remedie to helpe himselfe at the common lawe, but shall be compelled by the common lawe to paie the money againe, and than as in

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 wage his lawe, it is cleare for him in lawe and consci-
 and so me thincketh that this reason maketh tyle for that

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pleade a payment againste an obligation without wrighting that in the chauncerie he shall, that yet the lawe in the court, and in the other, as to the righte of the debte one. For the judges of the common lawe knowe as just the grounds of the lawe, that the payment sufficientlie setteth the debt in reason and conscience, as the chauncerie but yet they may not by the maximes and customes of the court admit the onlie payment for a sufficient plee before them, that they thincke it not sufficient in reason and conscience to charge the debte, but that they may not breake the ground principles of old tyme used in the court where the action is taken. But the common lawe pretendeth not, that the law stretcheth to all court, nor to the whole common lawe, certain court accordinge to the custome before time used therefore, at this day if an action of debte be broughte under the some of 40s. in the countye, hundred, or court baron, the defendant shall wage his lawe; and in the court baron the defendant shall confesse the deed, and praie that it be enquired of the dutie. And so it is oftentimes seen, that the several court have severall customes, and the lawe suffereth all: as in the common place an outlagrie shall be some times reversed without a writ of error, and in the kinge's bench an outlagrie shall be reversed without a writ of error; and in the common place upon the first defaulte in a *scire facit* execution shall be awarded, and in the kinge's bench an action shall be awarded. And why may than the said maxime holden in the kinge's bench and common place, and in some other court as be holden after the common lawe, and yet not be holden in the chauncerie? And I wold thinke further, that if it were enacted, that upon an obligation every man that wold move for a subpœna in the chauncerie, it were than no greater disadvantage that the defendant in soche a subpœna, might pleade a payment against the obligation, without offendinge the common lawe, yet if an officer of the chauncerie after that statute sued upon an obligation by the privilege of the chauncerie should suite the defendant should not pleade a payment without a writ of error. And if such diversitie of pleadinge should be suffered in one court, it is little mervayle than tho' it be suffered in several court. And than it followeth furthermore thereupon that the defendant in that suite taken against him by the privilege of the chauncerie, as is sayde before, hath payde the money, and hath taken none acquittance, than he hath no remedie on a bill conteyninge the matter to desire, that the court may have an injunction to surcease in that suite taken in the chauncerie after the maximes of the common lawe, and to answer to his bill there after the lawe of

of subpoena. And yet no contrarietie be in it. For the
 lawe claimeth not, that that maxime shold secure in any
 place but at the common lawe, and that onlie in courtes of
 lawe as is saide before. And it seemeth a greate reasonable-
 the lawe, that it willeth the said maxime to stretche to no
 courtes but to the courtes of the common lawe. For if did,
 seeme to be far unreasonable; for certaine it is, that if
 they be paide, the debte in reason and conscience is dif-
 ficult, though ther were no acquittance made, and than that
 shold uniuersallye put the partie that hath paide the mo-
 unt acquittance from all remedie. And therefore me-
 th it shold more commend the common lawe that it
 remedie to be had in this case in the chauncerie, than it
 if it shold cleerlie prohibit it. And therefore they speake
 gainste the common lawe, that would so have it, than
 And if any man wold say, that if soche remedye may
 in this case in the chauncerie as I have sayd before, that
 said maxime is voyde and serveth to no purpose; for
 ry obligation soche surmise may be made though the mo-
 unt not paide, and so shall all plaintiffs be delayed by soche
 surmises: to that it may be aunswered, that if he that
 the surmise cannot proove his bill, he shall yelde da-
 mages to the plaintiff, and the plaintiff shall also procede at the
 lawe. And also it serveth to this purpose, that it maketh
 be bound the rather to take acquittance or the obligation
 of acquittance, wherby shall followe the playner reckon-
 the lesse variaunce amonge the people; and if that max-
 im not, manie defendantes wold pleade a payment or that
 nothing, though it be ontrue, that will not sue to have
 a and find suretie to paie damages if he cannot proove
 be true, knowing it to be untrue. And thus me thinck-
 the saide maxime is good and reasonable, and also pro-
 the common wealth, though remedie may be had in the
 e, as is aforesaid.

*Another consideration whie it hath binne used
subpœna should lie.*

THE SIXTH CHAPTER.

IT hath bin used, that when feoffees have been seized
use of a man and his heyres, and that they have bin
to make estate accordinge to the use that they were in feoffe
it, that than he to whose use they be so seized should have
pœna to cause them to make the refoffment unto him.
a feoffment be made to the use of a taile, and it was agree
the feoffees shall stande still seized to the use of the taile
makinge any estate thereof, than in that case there lyeth
pœna against the feoffees to make estate. But if the tena
taile in use after the use made in taile had graunted to the
fees, that they should stand still seized without makinge any
to him or to the heirs of his bodie, in that case if the tena
taile die, his heyres maie have a subpœna againste the feoffees
if they refuse to execute the state truly; for the tenaunte
had no power to bind his heyre, but that he mighte aske of the
fees execution of the taile if he liste. And this was wont to be
the most common case wher a subpœna was sued till the statute
Richard was made. But yet since that statute, though the feoffees
maie enter and make a feoffment, yet he maie have a subpœna
to cause the feoffees to make him estate if he will. And the
feoffees of truste graunte a rente charge, the feoffer hath
medie to discharge that rente by the rules of the common lawe
but by a subpœna. And as an use is of landes, so there is
of goodes and debtes. And ther be so manye diversities
man shall be seized to the use of another and wher not, and
a subpœna lieth againste them that be seized to the use of another
to make them estate and to maintaine actions to their use
not, that it wold aske a special treatise to declare it. And
fore I omit the articles for this time, and shall only touch
use firste began. Wherein I will followe a lytle treatise
lishe called the Second Dialogue betweene a Doctour and a
nitie and a Student in the Lawes of England, wher is
as in the 22d chapter thereof appeareth, that uses were
by a secondarie conclusion of the lawe of reasone in such
as in the saide 22d chap. appeareth. Againste which
the same person of whom mention is made before in the
tise taketh exception, and saith that they began, as he

untrue and false purpose, which he saith appeereth by that,
 which maketh soche a feofment saith and doth one thinge
 thincketh another cleane contrarie. For he saith, that he saith
 word and by his deede and writinge and liverie and seasin
 the feoffee shall have the lande to him and to his heirs; and
 mynde and his intent is, that he shall not have it, but that
 he shall have it himselfe. Then saith he further, what a falsenes
 to speake and do one thinge and to thincke another cleane
 contrarie to the same! Every man may perceave, saith he, that
 there maye come no goodnes but craste and falshoode; and so he
 saith, that uses began by untrue and crastie invention, and are
 caused by an untruth and for a deceite. And at this reason
 what I mervayle. For me thincketh it is not grounded ac-
 cordinge to truthe; for moste commonlie when feofments of truste
 are made, the feoffer maketh the feoffees or at leaste some of them
 to his intente, for commonlie ther is no feofment of truste
 by deede, though it may be otherwise, but is seildom seen;
 and the feoffees or one of them must take livery of seasin, or
 take a letter of attorney to take it. What falshood than is it,
 that the feoffees or part of them be made privie thereto! And
 that none of them be made privie, as some time it maye
 be if a man make a lease for a terme of life the remainder to
 some persons to his use, and they knowe not of it, ne never
 receive any money ne other recompence for it; what falsnes is there,
 that the lessor after the death of the tenaunte for terme of life
 shall have the profits? I see none. And therefore all the doubt is
 whether such a feofment of truste is made, whereby it appeereth by
 the wordes of the deede, and as the verie trothe is, that the
 use is given to the feoffees as to the possessours, howe an use
 is reserved by the lawe contrarie to the word. And yet doth
 the lawe suffer such a reservation of an use upon such groundes
 as in the faide dialogue is spoken; and therefore if any defaulte be
 in the lawe, for the partie sheweth commonlie what his
 intent is to do if the lawe will suffer it; and because the lawe
 suffer it, it taketh effect accordingly; that is to saie, that the
 party shall have the possession and another the use, which use
 sometimes is appointed to be made by indentures of marriage
 or conveyances and sales or to declare their wills, and that many
 times by the advice of learned council nor of no craste nor falshood.
 And whether it were good to breake all uses or to let them
 stand, I will not treate of at this time; for it is not the entente
 of this writinge. And if they should be broken, the cause to
 breake them were not, because they began of craste and falshood,
 but the same treatise is sayde, but for unquietnes and trouble
 caused by them, and speciallie by uses in tayle. And as to
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the mischeife that is alledged in the same treatise that cometh
 them by losse of escheats and by avoidinge tenauncie by the
 and in dower and soche other, me thincketh it is little to
 garded; for though it be certaine, that where soche tytles
 given by the lawe that it is against righte and conscience
 them from them that they be so fallen unto, yet to prevent
 tytle therein, so that no tytle shall come it is not against
 science, so it be not doone of an evil will to him that the
 shold fall to. And therefore if a man that holdeth by
 service being sicke and like to die marrieth, his soone
 within age, because he wold have the halfe of his marria
 selfe to paie his debtes, he doth no wronge to the lord.
 it is in all the cases that be spoken of in the saide treatise whe
 tytles be put awaie by meanes of uses. And likewise
 that hath no heyre generall nor speciall selleth his lande, or
 it awaye, to the entente that it shold not escheate, he doth
 wronge to the lord. And these articles and the articles
 treated of in the 5th chap. make me some time to conjecture
 the saide treatise was not made by any serjaunte at the lawe
 is entytled to be, but of some other, that, as it seemeth,
 zeale to the lawe, though peradventure some of the motives
 he maketh weare rather to the discommendation of the lawe
 to the commendation of it. For what praise weare it to
 to prohibite all writs of subpœna, and yet no remedie to be
 at the common lawe? But if remedie were provided at the
 mon lawe, it were the less force, if writs of subpœna were
 awaie. But in some cases wher subpœnas lie, it were verie
 to provide any remedie to be at the common lawe, as in
 of the evidences whereof the partie knoweth not the number
 wherof mention is made in the 2d chapter. And also in
 other cases, whereof I intende to touch briefly by certaine
 and grounds, a man some time may have righte to a thinge
 science, and where he has no means to come unto it at the
 mon lawe, and yet there lieth no subpœna.

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after followie divers cases and groundes, whereby it appeareth, that a man may have righte in conscience which cannot come unto by the common lawe, and that yet he shall have no subpœna.

The SEVENTH CHAPTER.

Lord and ternaunte be, and the ternaunte holdeth of the lord by knight's service and certaine rent; the lord distreyneth ternaunte's beastes, and thereupon maketh avoure upon his kinge that he holdeth of him by fealitie and certaine rent, thereupon hath returne; and after the ternaunte dyeth, his beinge within age: in this case the lorde is concluded as the heyre to say that his auncester held of him by knight's service, and that is, by reason of the saide avoure, whereby ap- of record that he himselfe averred the land was holden in soccage; and yet the trothe is, that the ternaunte hold- him by knight's service. And therefore if he bringe a intrusion, *maritagio non satisfacto*, against the heyre at age, and the heyre pleadeth the said recorde againste him of conclusion, the lord is without remedie at the common and yet he shall have no remedie by subpœna in the chaun- for if he shold, he would saie directlie againste that which was proved before in the kinge's courte of recorde; and there- ough he have righte, the chauncerie will suffer him to be without remedie, as for any helpe that he shall have of the rather than to suffer soche an open contradiction to remaine in the kinge's courtes, and rather than it will give him againste his own confession. But yet in this case the is bounde in conscience to restore him the value of his mar- and the profits of the lande during the nonage; yet he is compellable thereunto by no lawe. And also againste all other persons that wold take the wardes of the said heyre, the lorde shall have good remedie by the common lawe; for none shall have advantage of that estoppel, but they that be partie or privie to the recorde.

if a man levie a fine with proclamation of lande, that he had another man hath right to, and he giveth him no non- proof; after this five years passe without claime, whereby the had the right is barred in the lawe; yet he that levied the is bound in conscience to restore him that had the righte, unwittingly deceived him, and did as he shold not have bin bound. And yet though he be bounde in conscience to restore there lieth no subpœna to compell him thereto; for there is no subpœna directlie againste a statute, nor directlie againste the words of the lawe; for if it shold lie, than the lawe should be voided, and that may not be done by no court.

courte but by parliament. And therefore if a man procure lateral warrauntie to extinc̄te the right of another, and the rauntie descendeth upon him that hath righte, whereby he is barred of the lande in the lawe; though he that procureth be bounde in conscience to restore him that had righte, yet he shall have no subpœna to compell him thereto, for the cause is not remembered; for the lawe is, that he shall be barred not of this courte or that, but generallie. And therefore if it were acted, that if an alien came thro' the realme as a pilgrim dyed, that all his goods should be forfeite, this statute against reason and not to be observed in conscience, and yet should lie no subpœna for the executors of the pilgrime; ther should, then should the chancelour give judgment against the statute, and that may not be in no wise; but if the statute be not good, it must be broken by parliament as it was. And so it is of the cases of the syne with proclamations, and the collateral warrauntie before remembred.

Also if the graunde jurie in atteynte affirm a false verdict given by the pettite jury in assise, yet ther lieth no fault tho' the partie hath righte and hath no remedie at the common lawe. And that for two causes.—Whereof one is, where the common lawe hath goone as farre for remedie as the lawe fereth, so that there can be there no furdur tryall, if the partie should have a subpœna, than the common lawe should have no ende, and thereupon should fall manie inconveniences. Wherefore the party shall rather be suffered to be without remedie than the inconvenience should fall. But in that case he that the land is bounde in conscience to restore, if he will save himself from dedlye synne, tho' he cannot be compelled thereto by no lawe.—The other cause is this. There is a statute made in the 4th yeare of king Henrye the fourth in the 22d * chap. judgments given in the kinge's courtes shall not be examined in the kinge's chauncerie, parliamente, nor els wher, but by the atteynte. And therefore if a subpœna should lie, it should lie directly against the statute. And like lawe is if the defendant in an action of debt upon a contracte wage his law untrulie by the plaintiff is barred; yet in that case he hath no remedie by subpœna, for the causes aforesaid.

* Chap. 23. in the printed statutes. EDITOR.

§ It has been long settled, that notwithstanding the 4th of Henry 4. our equity may relieve as well *after* as *before* judgment at law. However, in the time; and for some time after, it was a controverted point. Those, who will trace this controversy through its several stages, will be able to gratify their curiosity consulting the following books: namely, Cro. Jan. 335. 343. 3. Bulstr. 112. 4. 1. ft. 85. Car. Rep. 144. 163. March 83. Hardr. 23. 130. 1. T. Raym. 227. Jurisd. of Chanc. vindicated at the end of vol. 1. of Rep. and Sir Rob. Atkyns's Enquiry into the Jurisd. of Chanc. 39. EDITOR.

if a man buy goods of another for a certaine sum of money and after maketh his executors and dyeth, in that case there is no action at the common lawe against his executors; because their testatour mighte have waged their lawe, and they might; and therefore the law for eschewing of a greates inconvenience and mischeif that mighte followe to all executors, if actions shold be maintayneable againste them upon a bare allegation, and where their testatour, if the action had bin brought upon an untrue surmise, might have waged his lawe and they might, will not suffer any action in that case to lye againste him. And than I have heard this taken for a grounde, that at the common lawe putteth a man from his remedie, tho' he mighte, for eschewing of an inconvenience that mighte followe upon it, and that than if the remedie shold be had in the chancery, in the same case the same inconvenience should followe as should have doone at the common lawe, that there no action shall lye. And that it should be so in this case to all executions is evident; and therefore no subpœna shall lie as meane to enforce it. And like lawe is, as I take it, upon an untrue presentment in a leete for such a thing as toucheth not freehold, that where there is no remedie at the common lawe to travers it, so there shall be none by subpœna; for the cheif cause why the lawe suffereth no travers in this case, as I take it, is to avoid the greates trouble that might ensue upon such traverses, by reason of the great multitude of such presentments in all shires, hundredes and leets within the realme; and as greates trouble would ensue if a subpœna should lie in this case as well as by traverses, and therefore no subpœna shall lie. And the bookes assigne another reason why there lyeth no traverse against such presentments, that is to saye, because the lawe suffereth soche presentments, which be made by twelve men, in the place where the offence is supposed to be, to be true, and suffer the partie to have no traverse to it, unless he put in a traverse to the presentment the same day, and that if he pass without a traverse shall lye for him; and tho' this consideration seeme somewhat to proove that no traverse shall lie against presentmentes, yet I thinke the most principal cause thereof is the eschewing of greates suites and unquietnes, that might followe to the people, if soche travers were suffered. And the lawe provideth and forseeth that no hurte shall grow unto a

At latter times the judges have allowed actions of *assumpsit* in which wagers are allowed, for debts on simple contract, against the original debtor, and against his executors; and since this deviation from the rigor of the law was formerly understood, it has been determined, that, though in debt on simple contract, an executor may abate the action, yet he is at liberty to plead to it, and is justified for so doing. Vaugh. 100. 3. d. 1. Lev. 200. EDITOR.

multitude,

multitude, and for that consideration it is, that the law suffer no man to enter upon a discente, and that by a free open market the propertie is altered from him that hath it, and divers other soche lawes be ordayned to eschew mischief from a multitude.

Also if a woman covertly enduce hir husband to sell her land, and she taketh the money and converteth it to hir more use than the land was, and after of hir own free will maketh affidavit that if her husband dye, she shall never claim the land, but shall make such further suretie to the buyer as he devise, and thereupon she and her husband maketh him a tenant; than the husband dyeth, and she bringeth a writ and recovereth the land; in this case the woman is bound in conscience to recompence the buyer of money, and of all charges that he hath sustained by that occasion, and yet he have no subpœna, ne other remedie to compell hir to it. the lawe presumeth, that what is done by the woman is done by the means of her husband, and against that presumption shall lie no suite against her. And yet in hir own science she is bound to restitution.

Also if there be two joint tenants of goods, and the one hath the whole profit to his owne use, the other hath no remedy by subpœna nor otherwise; and yet he dothe against conscience to take the whole profits, and as he would not be doone so but for as moche as they put confidence each in other to purchase jointly together, therefore, tho' one of them breaks confidence, yet the other shall have no remedie neither by subpœna nor otherwise, against his owne agreement.

Heereafter followeth a short tytlinge of divers cases where a subpœna lyeth not; but the cause why it lieth not is shewed, but is left to other that liste to entrete further the matter.

THE EIGHTH CHAPTER

IF a man recover against a tenant for term of life or lease in the tale by false verdict, and entreth by force the same recovery, and after all the jurors dye, so that he loseth the land is cleerly without remedie at the common law yet he shall have no subpœna.

Also if a man without title recover land by a default *præcipe quod reddat*, and enter and taketh the profits, and he against whom the recovery was had bringeth a writ righte and recovereth the land without damages as he should by the lawe; in this case, tho' he that first recovereth be

science to restore the damages for the time he had the lande,
the other shall have no subpcena againste him to recover them.
if a man purchase an advowson, and after suffereth an
action before any presentation, and the six monthes passe; so
he hath no remedie by the common lawe to have a writ of
replevin, yet no subpcena lyeth for him.

if the tenaunte for term of life had at the common lawe
waste, there had lyen no subpcena againste him, ne yet doth.
if a man make a lease for a term of life, and the tenaunte
for term of life dothe waste, and after surrendreth his estate to
reversion, and he in the reversion was ignoraunte that
the surrender shoulde extingue his action, yet
subpcena lyeth in that case.

if a man offende a penall statute by ignorance of the lawe
the deed, and thereupon is sued and condemned in the
yet thereupon lyeth no subpcena for him.

if a man's servaunte thro' negligence of his maister, tho'
not by his commandement or assente, but for lacke of cor-
rectio, do offences and trespassse to his neighbour, whereby the
servaunte is bound in conscience to make restitution if his servaunte
is able, yet there lieth no subpcena againste the master to
compell him to it.

if a man take lande for term of life, and bindeth himself
under obligation that he shall leave the ground in as good case as
he founde it, and after the woodes thereof be destroyed by sodin-
g or strange enemies without any defaulte in him; yet he
is not condemned at the common lawe by reason of his own
negligence, and he shall also be without remedie as for any subpcena
he have in that behalfe.

whan tenantes for term of life before the statute that giv-
eth *quod ei desorciat* have losse their landes by defaulte, where-
by they weare without remedie at the common lawe, yet there
is subpcena for them in the chauncerie.

if a man of his meere motion and without any recom-
pense make a lease for a term of life, the remainder to the she-
riff or his proper name; in this case like as the remainder
is in lawe, so it is in conscience, and no subpcena lyeth
against him; and yet a feofment to the use of the sheriff of Dale
for his heirs without naming his surname or proper name, had
before this parliament.

if a man can prove by sufficient wrightinge, that in the
reign Henry the 2d. an annuities was granted to his aun-
tuncle, but by reason that they had no seisin sythe that time, he
is without remedie at the common lawe; so is he also without
subpcena.

Heereafter

* That is, no name of purchase.

Heereafter followeth a short tytlinge of divers thinges, it will be righte expedient for the chaunceller of England to have in remembraunce; leaste happelye if he aduise them not, he may charge himself in conscience with the whole thinge that is in demaunde before him, tho' he cannot be compelled thereto because he is a recorder.

The NINTH CHAPTER.

FIRSTE if the chaunceller grante a subpœna and taketh suretie that the plaintiff shall satisfy the party grieved his damages, if the matter in the bill be not founde true after the matter is founde againste the plaintiff and he is sufficiente to yelde damages to the defendaunte, I think, in that case the chaunceller is bounde in conscience to yielde himself; because he took no suretie at the grauntinge of subpœna, as he shold have done by reason of the statute made the 15th yeare of king Henry the 6th, the 4th chap. which is enacted, that no subpœna shall be graunted tyll suretie be taken for the truthe *. But if he taketh soche suretie, that is for discharge for him, tho' the sureties after decaye and be not able to yelde the damages.

Also if a judgment be given in the kinge's courte, and that judgment the partie surmising that the judgment was against conscience prayeth a subpœna to have it examined in chancery, and thereupon the chaunceller compelleth the plaintiff to finde suretie according to the said statute that he shall yelde damages to the party grieved if he cannot proove the same true, and after it is founde against the plaintiff; in that case the plaintiff and his sureties, for that they be decayed sureties, be not able to yelde the damages, than the chaunceller is charged in conscience to pay them. For tho' he have taken the lawe in takinge the sureties, yet by the grauntinge of subpœna he hath done against the statute made in the 15th yeare of Henrye the 4th, whereby it is enacted, that judgments given in the kinge his courtes shall not be examined in the chancery parliamente nor els wher, but that the parties and their heirs shall be in peace till the judgment be reversed by error or attaynte if any be; and therefore if the

* In Mr. Ruffhead's edition of the statutes, it is observed, that chap. H. 6. is not upon the roll; and therefore it's being a statute seems questionable. However, lord Coke concurs with the writer of this treatise in considering it a statute; nor is it objected to by the learned observer on antient statutes. See Barr. on Ant. Stat. 4th ed. 403. Whether it is a statute or not, it has been the practice in chancery to issue subpœnas without taking security, except in some cases, as where the plaintiff resides or is going abroad, and the defendant's ground applies to the court to have security given. Pract. Reg. in Ch. 3d Edition.

surtyes be not sufficient to yelde the damages, the chauncellour as manye men saye, is bounde in conscience to do it.

If the chauncellour, eyther from vehemente conjectures or other information, giveth sentence without proofes, than he bindeth himself to this jeopardie, that if afterward it come to his knowledge in more credible manner than the firste conjectures, that the conjecture were not true, than he is bound in conscience eyther to redress the sentence or to restore the party to all that he loseth by that sentence. And therefore it is a more way, that eyther he give judgment by proofes or else by his own knowledge, as I suppose well he may if he knowe fastly the trothe of his owne knowledge. And here I put this diversitie in this matter, that if the chauncellour give judgment according to the proofes, tho' they be untrue, that he hath for his discharge unless he knowe the contrarie of his knowledge. For he hath followed the order of the tryall set by the lawe in that case, and that sufficeth to him.

Both for the ordinarie if he presente the clerk of him that he is true patron by the *jure patronatus*, though he be not so; for he hath done that that the lawe would he should do in knowledge of the trothe therein: but if he will not graunte to enquire *de jure patronatus*, but will present by other allegations and presumptions the clerk of him that he thincketh to be right patron, he byndeth himself to this jeopardie, that if he be righte patron indeede, a *quare impedit* lyeth againtt him.

And so me thincketh, that the chauncellour likewise byndeth himself to yelde damages if he give judgment upon conjectures though he thincketh never so cleerlie in his conscience they be true, unless they be true indeed. And yet some say, that though they be true indeed, that yet he offendeth, because he hath set a certaintie of his judgment in a thing that is uncertaine, and that is not appointed in the lawe for him to followe for his warrantie; and they thinck he should do so with conscience; for it is sayde, *qui amat periculum in illo*, he that will willfully put himself in jeopardie shall perish thereby. And though that text may also be reasonable expounded to other jeopardies, yet it seemeth, that it conveniently be applied to this purpose, that is to say, that he putteth himself in jeopardie to offend that giveth a judgment and is not in certaine of himself nor by the order of the lawe that his judgment is true. And so it is, if a man taketh an oath and sweareth preciselie that such a thing is true, which he knoweth not but by conjecture. And I believe their saying to be true for this reason. For I have taken it allwaye for granted, that if a man have no sufficiente proof of his tittle by writing or otherwise that he is without remedie in the chauncerie;

chauncerie; and if the chauncellor might give judgment by conjectures, that wear not so, for he might then judge by conscience judgeth him to do after as he thought to be the reasonable conjecture. And where some men have sayd, the chauncellor upon a subpœna is not bounde to judge *seru allegata et probata*, but accordinge to the trothe; as I take it is to be understood in this manner, that, though prooves brought into the chancery which proove sufficiently for one of parties, that if the other partie can sufficientlie enstruſe the chauncellor that he hath better matter than he pleaded first, that is newlye come to his knowledge, and prayeth that he be admitted thereto, the chauncelour may admit him to it after publishinge of witnessies as before if he will; but he is not to be used without a verie special cause, for it is against the common forme of the chauncerie. And also he may suffer parties to chaunge their demurror, and that is a greates favour for they shall not be admitted thereto in none other court but the kinge. Also in the chauncerie a double plea, ne a departure from his plea, ne two plees wher the one goeth to the whole, ne not condem him that pleadeth it; but the verie trothe in conscience is to be searched, and that trothe cannot be searched by conjectures as me seemeth.

And some men say, that if the chaunceller grante a subpœna upon a bill that appeereth evidentlye to belonge to the common law and not to the chauncerie, and though he there taketh accordinge to the said statute of Hen. 6. yet in that case he is bounde nevertheless to yelde damages to the defendant, if the bill be proved true; because he hath done against the law. And some men will say, that in that case an action lieth against the statute of *Magna Charta* against the plaintiff. Howbeit it is not determinately speake therein, but will likewise remit to other that will furder treate thereof for the plainer declaration of that matter.

And I would therein take this diversitie. If the matter of the bill were apparent and without doubt or argument that it belonged to the common lawe, that than it should seeme that the chauncellor should be bounde in conscience to yelde damages to the partie be not sufficient, as it is sayde before. But if there be matter in the bill be doubtful whether a subpœna lye thereupon or no, and he taking the lawe to be that a subpœna should lye in that case graunteth forthe a writ, it weare harde to say, that he should be bound in conscience to yelde damages, though he appeered afterward by reasoning of the judges or otherwise that the subpœna laye in the case. For they that be learned in the lawe may after moste common opinion be some tyme excused, that

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the council otherwise than the lawe is, so that they gave coun-
they thought the lawe to bee, and that they had taken suffi-
yme and studie to learne the lawe, and that specially in
cases as be verie harde to come to the knowledge of the
. And so it seemeth to be of the chaunceller in graunt-
of writs of subpoena.

if the chauncellor delaye the parties, eyther in the plead-
in the bringinge in of witness, or after the publishinge
ness, more than he wold be contented to be delayed him-
he weare in like case, either for favour to any of the par-
to keepe many sureties before him, or for suche other
like, he is bound in conscience to restore the partie so
, or happely both parties, of all their costs and damages
they have sustained by reason of that delaie; for he hath
as he wold not be done unto. But if the matter be verie
ul, and he therefore respiteth it, to be advised, or to have
of the justices, or for that he may not attende it for
more necessarie causes as he thincketh, there he may be
in conscience. And so the entente and cause of the de-
the verie charge or discharge of conscience in this behalf
seemeth.

*after followeth a tytling of divers objections, which the
of the foresaide dialogue layeth against writs of
ana with answers to them.*

THE TENTH CHAPTER.

STE he sayeth, that he marveleth howe the chauncellour
ay make such a writ to let the king's subjects to sue his
the which the kinge himself cannot do righteouslye, for
worne to the contrarie.—To that it may be answered, that
ge's oathe in that pointe is this, that he shall graunte
the lawes and customes of the realme; and than if
es and customes of the realme shall be understood as well
es and customs used in the chauncery as at the com-
we, as I suppose they be, and as I have somewhat touched
in the 5th chap. of this treatise that they be, than it is not
the kinge's oathe, though the chauncellor by means of a
a minister justice unto the subjects.

Another

Another objection is this. He saith, that the king's and his serjauntes be sworne to minister justice unto the subjects, and that so is not the chaunceller; whereby it seeme that his meaning is, that the chaunceller should be at libertie to break justice.—To that it may be answered though he be not bounde to do justice by his oathe, yet bounde thereto in conscience, and that more deeply the judges be, for he muste forme his judgments according to the lawe of God or to the lawe of reason, or to the lawes of the realme made to determine the righte of landes and goods that be not contrarie to the said lawes. And therefore if in his judgment, there is greater defaulte in him than in the judges if they erre; for the lawe of God and the lawe of the realme, and also the lawe of the realme, grounded upon those are moche more evident and apparent to give judgment than are the general groundes maxims and some customs of the realme; for the chaunceller shall not need to meddle with the estopple of the lawe, ne with the general rules of the lawe, yet with the forme of writs ne forme of pleading, where the greatest difficulties of the lawe depende. And peradventure may be the cause why a writ of error doth not lye upon the chaunceller upon a subpoena; for the judges presume that no man contrarie to so evident lawes will followe his judgment. But if he do erre indeede, he is as highlie bounde to reforme it or to make restitution as the judges of the common lawe be, and more.

Another objection that he maketh is this. In what maner shall the king's subjects stande, when they be put from the lawe of the realme, and be compelled to be deterred by the discretion and conscience of one man: and he saith, for as moche as conscience is a thinge of great uncertainty, for some men (he sayeth) thincke, that if they followe upon two straws that lye acrosse that they offend in conscience, and that some men thincketh that if he lacke conscience, and hath to much that he may take parte of his conscience, and so divers men divers conscience; for every man knoweth not what conscience is as well (saith he) as the lawyer.—And to that he may be answered, that the said consciences by him before remembered, whereof the one is a pure conscience and the other an erroneous conscience, soche a conscience as the chaunceller or any other are bounde to followe. But they are errors in conscience; and errors in conscience come seven manner of waies, as is expressed in the first dialogue, the 15th chap. which he that will keep in a cleane conscience must cleerlie abjecte and cast

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the conscience, which the chauncellour is bounde to followe,
 at conscience, which is grounded upon the lawe of God
 the lawe of reason and the lawe of the realme not con-
 to the said lawe of God and lawe of reason. And there-
 to be ruled by such a conscience seemeth neyther to be against
 lawe of God nor the lawe of reason, nor the common
 the of the realme, as in that saide treatise it is supposed to
 And that the chauncellor is bounde to order his conscience
 the lawe of God and the lawe of reason is evidente of it-
 and needeth no furdre prooffe. And that he is also bounde
 time to order his conscience by the lawe of the realme and
 none other lawe of man, it may appeere thus. If a man,
 of landes in fee, maketh his will that another shall have
 him and his heyres and after dyeth seazed; if it come af-
 erdes in question in the chauncerie, whether this will be
 the chaunceller is bounde in conscience to judge it to be
 in conscience, because it is voyde by the lawe *. And like-
 of father and soone be, the soone purchaseth landes in fee,
 eth without any heyres of his body, the uncle by the lawe
 have the land as heyre unto him and not his father; but if
 ther have afterward another sonne, than that sonne shall
 the lande from his uncle as next heyre to his brother; and
 this matter come after in variance in the chauncerie for
 ce or otherwise, the chauncellor is bounde to order his
 ence and to give his judgment accordingly as the lawe is.
 therefore though no writ of error lye upon a judgment gi-
 the chaunceler upon a subpœna, yet it will appeere upon
 tter whether the judgmente stande with conscience or not.
 is not to thincke, that whatsoever the chauncellor at the
 his judgment thincketh to stande with conscience suffici-
 schargeth him in conscience; for if there be any error in
 science and in his judgment by any of the causes contain-
 the said 15. chap. of the said first dialogue, or otherwise,
 bounde to reforme it. And that he is bounde to more
 ny other judge; for other judges may some time give
 nt againste their own knowledge, and also against the
 and yet no defaulte to be in them, as it is in all tryalls,
 death of man where they may not give judgmente against
 wn knowledge; but the chaunceller shall never be bounde

would be remembered here, that our author wrote before making of the sta-
 34. and 35. of Hen. 8. from which the power of devising land com-
 Indeed before those statutes there was an *indirect* mode of devising land
 the medium of trusts. But it seems from our author's doctrine, that this eva-
 ly endured where the testator previously to his will had actually parted with
 estate to a trustee; and consequently that the refinement of considering the
 trustee was not then established in our courts of equity. See the preamble to
 of uses of 27. H. 8. and the clause in it in favor of prior wills, and also
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to give judgment against his own knowledge, nor against that appeereth evidentlie to stande against conscience for no manner of tryall. And tho' some men may be deceived thro' a pulous conscience, or an erroneous conscience, or in such manner, yet it is not to presume, that the chaunceller, who is allwaie appointed to his office by the kinge as a man of wisdom and good conscience, will be deceived by such in conscience, having such straye rules to the order of his conscience as he shall have. And so me thincketh it is not against the common weale of the realme, tho' soche cases as writs of *pœna lye* upon be committed onlie to the judgment of the chaunceller.

Also another objection that he layeth to the Student is. He saith, that the lawe of the realme is a sufficient rule under you and your conscience what ye shall do in every thing what ye shall not do. If ye therefore followe the lawe, ye cannot do amiss, nor offende your conscience, ne ye thinke neede to leave the lawe for conscience: by which saying seemeth that it is in vain in any case to sue by *subpœna*, as a man should never have helpe by conscience wher he could none by lawe.—And to this saying it may be answered that if he take the lawe of the realme as a lawe grounded on the lawe of reason and the lawe of God with the customes and maxims of the lawe ordayned by the realme, I thinke that (as he saith) the lawe of the realme will be a sufficient rule to order a man and his conscience what he shall do. But the lawe will not alwaies give him remedye, when he hath right, as appeereth in the 2d chap. and the 3d. and also the 7th chapter of this present booke. And after this lawe it is that the judgment is given when they set with the chaunceller in the chauncery, also when they sit upon arbitrementes. And if he that maketh the same Treatise take the lawe of the realme as a lawe grounded on the maxims and customes and the rules of the lawe, according to the processe, as is used in the kinge's bench, in the chancery place, and such other courtes of record as be common to the lawe, for courtes of the common lawe, I suppose that he will say that the lawe of the realme so taken is sufficient to order his conscience in all things; and if he do, me thincketh it is a great thing therein; and that may appear in divers cases, of some be put in the same 7th chapter, and some shall hereafter appeare. If an infante of the age of 20 years sell his land for 100l. I suppose also he buyeth lande with the same money for a greater value than his owne lande was: in this case by the lawe he may enter again into his owne lande; yet the other party shall have no remedie against him by the lawe of the realme, as is said 100l. I thinke that no man will say that infantes may sue with conscience both to retayne the lande and the 100l. and

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ome cases.

the lawe will suffer him to do it if he will. Also in all cases a man hath righte and is estopped by some recorde or other- so that he therefore can have no remedye by the lawe to er his righte, yet may not he that doth him wronge, re- that he keepeth wrongfullye from him with conscience : et if he will the lawe will not prohibite him the contrarie, therefore he must ther of necessitie be ruled after conscience will be saved. Also if a man owe another an 100l. and the by sodeyne losf on the sea, or by fire, or soche or such casualties leeseeth all that he hath, in this case the debtee by we may recover his debte, and thereupon take a *capias ad sciendum* and laye the debtor in prison, there to remain till th paid the debte, without any help that he shall have in we. And yet I suppose that he that hath made the sayde ife will not saye, that if the debtee knowe perfectlie that the losse his goods by soche casualtie, and not through his owne and that he hath nothing left to pay him with, that he in conscience keep him still in prison ; for if he do, I suppose he faithe as he wold not be done to. And therefore it shal alwaies to use the lawe, with a dread that he offende not conscience, in executing all that he may do by the general thereof, as he may undoubtedlye do, and yet the lawe in to be good, as it will appear in the 16th chapter of the first dialouge.

But another objection is this. He faithe to the Student, that travyleth moche, that the Student will say that men that wronge, may be holpen by a subpœna in many cases, in as as he faithe there are in *Natura Brevium* several writs and ers natures for the reformation of every wronge, that is or committed contrarie to the lawes of the realme ; and in *Natura Brevium*, as he faith, there is no writ called a sub- ne yet that the nature thereof is not there declared, as is of all the writs specified in the faide booke : and so it sh that his meaning is, that because a subpœna is not in a *Brevium*, therefore ther shold be no suche writ — And old seeme to be but a slender objection. For the said booke taken of such autoritie, that all things that is in it is cleere ne that it is not so perfecte that all writs that pertaine to the should be contayned therein. And therefore I suppose that be hard to fynde in *Natura Brevium*, wher an action upon e or a writ of forcible entry lye ; and so I suppose it will livers other actions upon statutes if it weare thoroughly d.

so I thincke, that the faide objections be but of small ne and of small effecte to proove that a subpœna may not me cases.

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G's-BENCH and COMMON-PLEAS.
by LORD CHIEF-JUSTICE HALE.

piece is extracted from one of the three volumes of lord Hale's
scripts, for the use of which the editor has already acknow-
ledged himself indebted to Mr. Jekyll. In point of subject it con-
cides with the chapter on the court of common-pleas in lord Hale's
"Considerations touching the Amendment of Laws," before inserted
in volume.]

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ING's-BENCH and COMMON-PLEAS.

C A P. I.

Concerning process by capias, &c.

At common law there was process to arrest the body of the defendant in these cases :

In trespass *vi et armis*,

In the king's case for his debts,

In pleas of the crown,

In case of deceits or contempts committed to the king's courts, which is farther enforced by the statute of Westminster 1. cap. 29.

But there was no process of *capias* to imprison the defendant in debt, detinue, covenant, or annuity, but summons attachment and distress; nor in actions upon the case, but only *pone per vadium*, or attachment and distress. The first statutes, that gave process of *capias* in those actions, were these :

In accompt Marlbridge cap. 23. Weston. 2. cap. 11.

In debt and detinue 25. E. 3. st. 5. cap. 17.

In trespass upon the statute of 5. R. 2. annuity and covenant 23. H. 8. c. 14.

In actions upon the case in the king's-bench or common-pleas 19. H. 7. c. 9.

Neither could the courts issue *capias* at discretion, but where the common law or acts of parliament or the immemorial custom of the court allowed it.

H. 8.

H. 8. E. 3. Rot. 23. B. R. a writ in the king's-bench of *facias ipsum* at the king's suit in a case of a trespass challenged because *contra communem legem et contra formam in cancellis usitatam*, but that he be proceeded against *per attackiamenta distractiones ubi dilationes habere possit, prout moris est*. No judgment given, but a *superfedeas* issued.

C A P. II.

Touching original writs and writs by original.

ORIGINAL writs issue out of the chancery return into the king's-bench or common-pleas.

The writs returnable into the common-pleas are generally original writs, as well in real as personal actions.

The writs returnable into the king's-bench are,

1. Assises of novel disseisin in the same county where the bench sits.
 2. Writs, that suppose a personal wrong or force, as *tre vi et armis, ejectione custodiæ*, ravishment of ward, *ejectione firmæ, vi laicæ*.
 3. All writs or suits for the king, whether real personal mixt, as writs of right.
 4. Writs of *quare impedit, quare non admittit, &c.* *H. 3. B. R. Rot. 56. Crompt. Jur. Courts 71.* though books are contrary; therefore this hath been ordinarily in common-pleas.
 5. Writs of replevin.
 6. Actions of conspiracy, actions upon the case 19. cap. 9. and regularly all writs in personal actions, except detinue, covenant, account. Some instances have been of annuity there brought. *H. 47. E. 3. Rot. 18. Eborac.*
- Of original writs, some are fineable and pay a fine to the king as all real actions, assises, covenant to levy fine; and personal actions, as in debt, where besides the charge of the writ which is 6s. 8d. there is paid unto the hanaper for every demand of 10 pounds 6s. 8d. and if above forty pounds and under 100 marks 6s. 8d. more, and so for every 100 marks 6s. 8d. *F. N. B. 96.* and in the like proportion in trespasss, trespasss upon case, covenant, where the damages exceed.

These fines in personal actions are divided, one moiety to the curstors, the other moiety to the lord keeper and master of the rolls.

C A P. III.

The matter of the jurisdiction of the king's-bench may be distinguished into *pleas of the crown* and *civil pleas*.

cept *habeas corpus*, wherein partly by the statute of 16. and in some cases also upon a privileged person committed, they may judge of the insufficiency of the return, and discharge or remand him.

as on the suit of the party; and they are of several sorts: Trials and judgments of causes depending in chancery; by *travers*, *monstrans de droit*, petition, *scire facias*; or attachment of privilege or suit against a privileged person in chancery, wherein issue being joined in chancery it is sent into King's-bench to be tryed.

Seire facias to execute fines or judgments in other courts, ed into chancery, and sent by *mittimus* into the king's- to be proceeded upon to execution.

Writs of error upon judgments given, not only in the
on bench, but in all other inferior courts of record, as
of assize, corporation courts; wherein though anciently
n was, that they were returnable in the common-pleas as
king's-bench, F. N. B. 20. yet, now the law and prac-
settled for the king's-bench. Pasf. 26. El. B. R.
n. 6. Roe and Hartly, Dy. 250. and P. 29. El. B. R.
n's cafe.

quites between party and party originally commenced
de quibus infra.

C A P.

C A P. IV.

Concerning original suits between party and party; and touching suits by original writ.

ORIGINAL suits in the king's-bench are of two kinds, viz. either by original writ out of the chancery, or by bill. Suits by original writ there are of three kinds:

1. Such as cannot at all be there held by original, and mixt actions (except assise, *ejectione firma*, *ejectione* and those four kinds of personal actions, debt, detainer, compt, and covenant.

For these are *communia placita* within the statute of *Carta*, cap. 11. and cannot be held by writ in the king's-bench but must be in the common-pleas.

2. Such as may be held by original writ in the king's-bench and cannot be held otherwise.

Such are all writs of error, wherein they cannot proceed by original.

And so it seems also upon the statute of hue and cry, 37. El. Sadler and Morfe; though 7. Car. B. R. in a case there was a proceeding against the heirs of a knight, *custodiâ marescalli*, but no exception taken to it. So in *recordari*, and assise, they cannot proceed but by writ.

3. Such as they may proceed in by original, but likewise, if the plaintiff please, proceed by bill. Such are all actions of *ejectione firma*, *ejectione custodiâ*, and all personal actions except the four above excepted.

The original suits in the king's-bench without original writ are those suits by bill, *de quibus cap. prox.*

C A P. V.

Touching suites in the king's-bench by bill.

ORIGINAL suites in the king's-bench by bill are of two kinds, viz. original suites by bills at large, or suites by bill *privilegii*.

Suites by bill at large were anciently practised in this court, but have been long disused for the reasons hereafter given.

These suites were for the most part for contempts, deceits and trespasses upon the case, whether the same were committed in the county where the courts sat, or in other counties. And the law was, 1. For the party to enter his plaint or bill. 2. Thereafter he had the like process as was natural in such suit, had it been by original; viz. if in trespasss, attachment or *pone per viam et capias*; if in action upon the case, where no process lay till 19. H. 7. then by *pone per vadios* and distress, till statute came.

Processes of such suites by bill original were frequent in ancient

6. E. 3. Rot. 30. *Eboracum*. Attachment by bill *sine* *Nota*, suites *ad respondendum tam regi quàm parti* for a contempt committed in the county where the king's-bench sat. per bill in B. R. for conspiracies

3. Afs. 13. *et pur chose touchant le roy* 17. Afs. 5.

11. E. 3. Rot. 74. *Norf.* a suit by John Hened *per billam* *Affault in autre county vers un, que ad fuit* trespasss in a forren county, and the defendants *attachiati* in B. R. 31. E. 3. bill 11.

15. E. 3. Rot. 126. *Ricardus Fowler attachiatus per billam* *In C. B. ou B. R. for maintenance done* *respondendum in placito transgressionis.*

in curiâ; aliter per origin. 22. H. 6. 24.

30. E. 3. 113. *B. R. London.* *attach. per billam ad respondendum tam regi et parti* for an assault committed upon him in London when he came to prosecute a suit in *B. R.* *Pro rege et parte for assault on coming ad curiam tiel autre county.* 30. Afs. 14.

41. E. 3. Rot. 56. *Staff.* John Bottetourt impleaded *per* *Vers efficer sur escape.* for a forren trespasss. 42. Afs.

49. E. 3. *B. R. Rot. 4. Linc.* proces *per* *Ed. 4. 2.* *attachement per* *In B. R. in* *versus vicecomitem* directed *al coroner* for the disturbing a *tresp. de battery clofe-bru-* of a liberty. *ser ou faux imprisonment.* 22. Afs. 83. 85. 86. 87.

Many

Many more instances of this kind probably may be; and particularly, where they did not proceed by original (as it is plain they anciently did in most cases) their usual proceeding was by original bill, and not as now by a general bill of Middlesex *in placito transgressionis*, or a *latitat*, which supposeth a bill of Middlesex *in placito transgressionis*, which seems not to be so ancient a practice.

Now touching these original bills in the king's-bench, the things are observable :

1. Regularly bill was filed before any process made.
2. The process was pursuant to the course of law, in which the suit had been by original; viz. in actions upon the case or trespass the first process was a *pone per vadios* or an arrestment.
3. The writ or process was special according to the nature of the bill, as it is or should be where the suit was by original.
4. This bill lay not for any such cause, wherein an original writ lay not in the king's-bench; and therefore was not in detinue, account, or covenant.
5. They were not frequent; because original writs of this kind were frequently returnable into the king's-bench.
6. They have been long disused upon many probable reasons, viz. first, because they diminished the revenue and profit of the fines or fineable writs; secondly, because there was an expeditious way in process of time practised, by bringing the party into the *custodia marescalli*, and then declaring against him in any action; *de quo infra*.

The second sorts of suits by bill were *ratione privilegii*; which are treated of in the next chapter.

C A P. VI.

Concerning suites by bill in the king's-bench ratione privilegii

THE proceeding by bill *ratione privilegii* extends not only to those actions where the king's-bench may hold plea by original or plaint, as *ejectione firme*, trespass and actions upon the case, but also to all other personal actions, which otherwise are usually brought regularly within their cognizance, as debt, detinue, account, or covenant.

This privilege is of three kinds. 1. *Privilegium ex parte actoris*. 2. *Privilegium ex parte defendantis*. 3. *Privilegium ex parte curie*, though it is also a privilege of the defendants.

the privilege *ex parte querentis* is, that any officer or clerk of courts may sue by bill or attachment of privilege.

the privilege *ex parte defendantis* is, that every officer of court may be sued by bill *tanquam præsens in curiâ*, and be charged if he appear not.

the two sorts of privileges are common to all the four courts minister, who hold plea by bill in all these cases.]

the privilege *ratione loci* is, when a defendant is in the custody of the marshall of this court, he is suable here by bill in person (as before) *in custodia marescalli*.

though not in *custod. mar.* Dyer 113.

tho' the defendant be let to bail, yet he is as to this in *custodia marescalli*; for they are his special keepers appointed by the consent of the court, 31. H. 6. 10. *mes aliter de die de die in diem.* 9. E. 4. 2.

But in the same county suit by bill lyes, Dyer 113. Though the commitment be upon surety of the peace, and presently

after commitment discharged. 7. H. 6. 39. 41. 42.

this kind of privilege is somewhat of the same kind with *On per errorious process al.* 27. H. 6. 5. 6. He is suable there by bill in any personal action; because *Et nota bill in custodia mar. de præmunire done per stat.* 2. R. 3. 17. 27. H. 6. 5. Bill ver. un in custodia marescalli, and so he that is *in custodia marescalli*, in court, and out of the power of the sheriff to be arrested, and therefore they may declare against him *in custodia*.

the bare prevention of a failure of justice is not a sufficient reason for it; for tho' the sheriff cannot arrest him while he is *in custodia marescalli*, yet they may arrest him when he is out of court, and tho' the sheriff cannot arrest him to bring him to another court when he is actually the marshal's prisoner, yet he may be removed into the court of common-pleas *in corpus*, and charged with an action, and committed to prison, with his causes.

the reason therefore of this privilege is, because the party is present in court.

And principally, because by long custom and usage the court of king's-bench hath enjoyed this privilege, and so it has become the law of the land, and is not alterable without an act of parliament. Cook. Jurisd. Courts 12. 31. H. 6.

Although anciently the greatest part of civil suites in the court were by original writ, or those original bills mentioned p. 5. yet now and for many years the great business of actions between party and party is transacted in that court by means of declaring against persons *in custodia marescalli*.

The

The means of making this practical in all cases is this. If the defendant be in Middlesex or other county where the king's bench sits, the plaintiff takes out a bill of Middlesex *placito transgressionis*, which is questionless within the jurisdiction of the court to proceed upon. But if he be not in that, or in any other county, then he takes out a *latitat* into that other county, which always supposeth a bill of Middlesex as its original. Both these processes are certainly very ancient and warrantable in this action.

When the party is taken upon either of these processes, he is either committed to the marshal or bailed.

And if he be committed the plaintiff need not, or at least need not, to proceed for trespass the matter of the first writ; he may declare against him in any personal action by the privilege of the court before mentioned; and so may any person else. If he be bailed, yet he is still, as to this privilege of being sued, in the custody of the *marescalli*; and by the course of that court such bail gives both him and his bail liable to any action commenced against him by the same plaintiff in the first and second term of the court after the process; and though the bail be not liable to the plaintiff, yet this bail given is an appearance to any action commenced the first term wherein the bail is given or the next after. And as the party plaintiff may revive his former action for trespass, and declare in any other action; so if there be several defendants in a *latitat* or bill of Middlesex, the plaintiff is bound to prosecute jointly against them, but may declare in several actions against the several prisoners. For the process of a bill of Middlesex or *latitat* is by custom used but as a method or process to bring the party *in custodia marescalli* to declare against him in any other action.

And as this is the order or method of bringing the defendant within the reach of this privilege; so the usefulness of this method of proceeding to the plaintiff is apparent.

1. He payes no fine upon the process to the king.
2. The process is cheap, the bill of Middlesex costs 2s. 6d. the *latitat* but 5s. 1d.
3. The plaintiff hath the advantage of time to sue, as his case requires; and is not bound to any constraint with any original writ or process. Variance hurts not.
4. He payes no costs, unless the defendant appears against him upon the construction that hath been put upon the process.
8. Eliz. cap. 2.
5. The bail is liable to any action of the plaintiff in the first or second term.
6. He may upon one joint writ declare severally against each defendant. By means of this and some other advantages

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part of king's-bench hath drawn the practice from the court of common-pleas; as well in those personal actions of debt, detinue, and account, which seem peculiar to the common-pleas as in most other personal actions which were common to courts, as trespasss, actions upon the case.

C A P. VII.

ing the relief, practised by the court of common-pleas, to help themselves against the advantages of the court of king's-bench.

THE court of common-pleas, finding, that, by the means aforesaid and some other advantages, the king's-bench had drawn the practice from the common-pleas, endeavoured some therein.

to answer the advantages of the *latitat* and bills of Middlesex, the court of common pleas used the help of a writ out of the *quare clausum fregit*, wherein they sometimes joyned three, or four defendants.—The defendants thereupon appearing, they took bail of them to answer a new original, which the plaintiff should purchase within terms. Thereupon the plaintiff procured one or more new originals against all the defendants, or some of them severally, in trespasss, action upon the case, or otherwise as his case required, and lately also in debt.

This practice, tho' but new and scarce warrantable, did them much help; for,—1. They had time to think of their declarations and to form them as their case required.—2. This was cheaper than the *latitat*, and no fine paid upon it; for as the bill of Middlesex was 2s. 6d. the *latitat* 5s. 1d. this cost but —Again 3. They did use to put three or four writs; and if occasion were took out several originals.

yet this did not cure all the matter. For—1. tho' in the common-pleas they avoided payment of a fine upon the first process upon their new original they were forced to pay a fine there, and so upon the long run the charge in the common-pleas was as much as before.—2. The king's-bench had still this advantage, that their bail laid the defendant and his bail upon bail to all the plaintiffs which he should prosecute before the second term; and besides rendered the defendant to be liable to actions of strangers within those two first terms.

therefore still the practice going where the plaintiffs found advantage, and the king's-bench carrying the practice from common-pleas, a second expedient was found.

By

By the stat. 13. Car. 2. ft. 2. cap. 2. it is provided, that in all cases wherein the cause of action is not expressed, the plaintiff should take only a bond of 40l. for appearance to be made, and thereupon amercements to stay.

This rendered the *latitat* and *clausum fregit* both insignificant, for, men being fond of good bail to their actions, of which this act they were in effect ousted, and the writs upon being special, the common-pleas had much the advantage of special writs to have special bail; and the practice began to shift thither, especially in actions of debt and trespass and action on the case, where if the debt or damages exceed 20l. the plaintiff took ordinarily special bail in both courts; and so by this the common-pleas relieved themselves in a great measure against the excess of practice in the king's-bench.

C A P. VIII.

Concerning the expedient used by the court of king's-bench to accord this last difficulty.

THE court of king's-bench, upon the difficulty put upon by this act, added a clause in the latter end of the writ of *Middlesex* and *latitats* (which ever was a *respondendum cito transgressionis*) *ac etiam ad respondendum in placito 200l. or in placito transgressionis super casum ad damnum* and so for any other action: and by this means they answered the intent of the statute answered, and the convention of special bail restored again, and thereby the court of common-pleas under the same if not a greater mischief than before.

How far forth this may be justifiable by law in those cases wherein the king's-bench might hold plea by original writ or original bill without the aid of the privilege of *custodia maris* may be considerable.

But it may be very difficult to justify it as to those cases wherein the king's bench could not hold plea by original writ or detinue accompt and covenant; for these are restrained to the common-pleas by the statute of *Magna Carta*, and were never to be pleaded in the king's-bench but by privilege, when the plaintiff was in *custodia maris*; and therefore it were hard to maintain a process, that should charge the party with those actions, when he were a prisoner of that court.

conclusion upon the whole business is but shortly this: those writs shall take place to answer the statute of 13. Car. 2. in the court of common-pleas in effect destroyed; for their *clausum fregit* is rendered ineffectual, and cannot be set up to hold pace with the bill of Middlesex and *latitat* thus made. Those writs shall not be thought either legal or to answer the statute of 13. Car. 2. then is the greatest part of the practice of the king's-bench lost: whereby, as in the former case, the ancient common law shall be in effect rendered useless; so, in the latter case, the court of king's-bench, the great nursery of professors of the law, shall become maimed. I present therefore laying by this consideration, I shall enquire what other advantages either court hath of the other, and they stand ballanced.

C A P. IX.

Comparing the mutual ballancing of either of those courts with the other.

The king's-bench, as peculiar to itself, hath pleas of the crown, writ of error, trial upon issues joined in the petty bag. The common-pleas, as peculiar to itself, hath fines and reversions, and actions of waste and real actions, which are very necessary and process to the outlawry in debt, detinue, account, and covenant.

Hitherto the courts seem to ballance each other.

Then, in relation to pleas between party and party, the king's-bench hath certain peculiar advantages; whereby it will stand out of the common-pleas, tho' the forementioned difficulties be settled. For instance,

The process and continuances in the king's-bench are *de die in diem*, which renders them expeditious. But the process and continuance in the common-pleas is to common days, which in many cases to great distance between their returns; though it be in part helped by the stat. 13. Car. 2. yet the help is not large enough.

There are no costs given upon *latitats*, unless the defendant appear in person*; which gives great encouragement to malicious plaintiffs, and multiplies suits in that court by reason of the plaintiff's great advantage over the defendant.

* See 8. Eliz. c. 2. f. 2. — EDITOR.

3. The plaintiff, paying no more for a process with accretion 1000l. than of 20l. plaintiffs have great encouragement vexatious, and unreasonably to oppress a defendant: which not be so in the common-pleas; because the plaintiff pay vexation upon fineable writs.

4. The bail in the king's-bench is liable to all the actions of the plaintiff, which he delivers within the first two terms; as it is unreasonable and inconvenient to the subject, and be reformed, so it greatly draws suites from the common law where their bail is in a sum certain and to answer particular actions.

5. Actions upon the case upon special promises, being the greatest part of suits, wherein the declaration original and ought to agree, place them of the common-pleas strictly to settle and draw their original and accord with it; whereas the king's-bench, their process being general, they may form mould their declaration before the entry of the issue or decision as they please, and as their matter will bear, which is a great advantage in point of practice.

6. They have no imparlance roll in the king's-bench; their pleadings are in paper, till the record entered upon demurrer; which must expedite their business, and enable amendments of mistakes before entry. But in the common law their *recordatur* of pleas and their imparlances multiply occasions in which the protonotaries at present impoverish the court by making errors.

7. Their repetition of originals in writs and declarations, their common bar in the common-pleas, make proceedings tedious, being above seven times transcribed and paid for; whereas which are in the king's-bench.

8. In the common-pleas there are three protonotaries in the king's-bench but one; in the common-pleas they have many of attornies, in the king's-bench not so many; in the common law pleas, there is the ancient use of writing fitting clerks, whereas as there shall be occasion, be ready at any time to give an account of the business of the court, while the attornies are busy about getting clients in the country.—These will not destroy that court.

These be some of those considerable advantages, which the king's-bench has over the common-pleas.

C A P. X.

consideration of those expedients, that may bring an equality to either court, in those civil pleas, wherein they have a common jurisdiction.

apparently necessary, that both courts should have the cognizance of those civil pleas that are common to both at this

In respect of the people, it is fit there should be *electio* and that all persons should not be necessitated to one; for it may occasion much inconvenience.

In respect of the courts themselves, neither of them should be deprived of what they usually have had, considering many dependant offices that either court hath.

In respect of the education and practice of the law, the Bench is the nursery of young professors, without which the store would soon be exhausted; and the common place of practice of serjeants, who should not be displaced.

ways therefore to compass that end must be by setting
1. Of cheapness or charge.—2. Of expedition or
3. Of accommodation of both courts to the ends of
the institution, the indifferent equal administration of justice to
the subjects.

A great obstacle will be the concerns and interests of officers who must suffer in either or both courts, if any good be done.

of the disparities in the last precedent chapter may be
by one or both courts, others not without act of parliament which is obvious to any that considers them.

I therefore apply myself to that which is of most consequence at present; namely, the rectifying of that disparity of the courts in relation to original writs *latitatus* and

C A P. XI.

Concerning the several propofals, that may be made, for the equability of each of thefe courts, in relation to the cognizance of both.

FIRST PROPOSAL.

THE first propofal may be, that the proceedings in the king's-bench may be by original writ out of the chancery, no more by *latitat* and bill of Middlefex; and that, considering the great increafe of original writs and fines thereupon, upon originals may be abated to fuch a medium-rate, neither exceed nor much abate the prefent revenue; and, in the end, that a medium be made upon the computation of writs and *latitats*, whereupon there is an appearance, to the fatisfaction the fame.

The difficulties herein are thefe,

1. This cannot be without act of parliament; and is expected to begin with the commons, becaufe it charges upon the people.
2. It will very much alter the practice of that court, which hath been long ufed.
3. It is to be doubted, whether the prefent confifts of the officers of the court of king's-bench be accommodated fuch a change, as filazers, *custos brevium*, protonotaries.
4. It will quite destroy fome offices in the king's-bench, which will very much impair the revenue of others, efpecially the office*.
5. It will take away the moft confiderable casualties of the chief juftice and judges of the king's-bench.
6. It muft take away the king's fines upon judgments formed by Henley.

SECOND PROPOSAL.

The fecond propofal confifts of feveral particulars.

- (1.) The king's-bench to retain their liberty of proceeding by original in fuch actions, where by law they may proceed, viz. in mixt actions *vi et armis*, and all perfonal except the four above-mentioned.

* Mr. Henley's office was probably that of chief clerk of the king's-bench. — EDITOR.

2.) The king's-bench to proceed in actions by bill, as now do, only with these ensuing variations and additions; most of which require nevertheless an act of parliament for their establishment in the method propounded.

That they may proceed by *latitat* and bill of Middlesex, now, in any mixt action *vi et armis*, or any personal action whatsoever.

But then the bill of Middlesex to be special according to nature of the action, without the *ac etiam*; as *ad responsum in placito transgressionis super assumpsit ad damnum*, or *in placito transgressionis super casum sur trover*, or *supra conspiciendo*, or *supra deceptione*, *ad damnum*, or *in placito debiti*, *conventionis fracta*, &c. *ad damnum*; and the *latitat* pursuant thereunto.

This will have these advantages:

1. It will answer the stat. of 13. Car. 2.
2. It will ascertain the defendant of the true cause of suit against him, that he may be provided to make his defence accordingly.
3. It will make process regular, and unquestionably warrantable.

That in all such cases, where the actions (were it by original) were fineable, the plaintiff to pay a half fine or some proportion, as, upon a consideration of a medium of fines in originalls and bills of Middlesex or *latitats*, may make compensation for the half fine abated upon originalls.

That the defendant appearing put in common bail or special bail as the case requires, or in default thereof be committed to the marshall.

The defendant appearing, though not in person, and filing common bail or special bail, as the case requires, the plaintiff declare against him according to the original process, or in default thereof to have costs by the stat. 8. Eliz.

The defendant having found special bail, this bail to be payable only to the action whereupon arrested, but to be appearance to any declaration *by the by* for the same or any plaintiff the same term.

Upon such declarations *by the by* no special bail to be taken, unless the defendant be actually *in custodia marescalli* and his liberty, and then special or common bail to be as the case requires.

Upon all declarations *by the by*, either by the same or any plaintiff, the half fine to be paid.

The half fine upon the judgment to be discharged, being answered upon the first process or declaration.

CONCERNING THE COURTS OF

The half fine upon the judgment falling, which
farme, the farme to be abated. Consideration to be

Of the king for his farm ;

Of the farmer *pro proficuo*.

10. The fines upon procefs and declaration to be diff
in the same manner, as the whole fines are upon writs
able in C. B.

11. Care to reduce the rates of bills of Middlesex or
(where original) to be as cheap in their charge of makin
seal as the like originals. But then to be considered, ho
judges and officers shall be reimbursed for what they lose

1. By sinking of procefs of *latitat*.

2. By sinking their number, which will necessarily
by this method.

12. To consider, where, and to whom, and how, the
upon first procefs and declaration shall be first paid a
counted for.

13. But when all is done, if the original writs in
sur case shall be special, as now they are, the common
will be at these disadvantages :

1. Their writs will be more chargeable accord
their , whether serviceable or not.

2. They will be laced up with a special original
which they must not vary in procefs or declaration
possibly upon advice with counsel there will be a
of alteration, though not in the nature, yet in the
form or circumstances of the action.

Therefore it seems necessary to abridge the forms of
action upon the case, by shortly expressing the nature
action, as in above declared walking bills of Middlesex.

THIRD PROPOSAL.

The third proposal is, that fines upon original
personal actions be taken away.

The difficulties herein are these :

1. That will destroy an ancient revenue of the
without a compensation.

2. And though those fines are now divided, as befo
tween the keeper of the seal, master of the rolls, and

yet they are the reward of their service, and if not supplied this way the king must supply it another way.

Neither will this alone set the courts upon an equal foot: the cheapness and easiness and convenience of the *latitat* bail in the king's-bench will still get ground of the common-pleas.

FOURTH PROPOSAL.

fourth proposal is, that fines upon original writ be abated in a proportion and fine set upon the first process by bill of *ex* or *latitat*, as upon a medium may countervail the rate upon originals; and these fines to be distributed between the keeper, master of the rolls, and cursitors, as now fines upon originals are. As if for example upon a medium calculation the originals were sixty and the fines of them rose to 60*l*. the *latitats* were one hundred and twenty, then the fines upon originals and *latitats* to be brought to a third part of the present fines upon originals, which would amount to the rate, viz. 60*l*.

though it seem the most probable of the three, yet hath some difficulties.

Men are not bound to file an original before the issue or return, and yet take out process of *capias* in the common-pleas, and the business compounded. It will be no more reasonable, therefore, to charge the first process with the fine; for by the parties may agree.

The form of the writ of *latitat* must be mended by act of parliament, and so must also the declaring *by the by* upon a writ *in custodia marescalli*: otherwise it can neither be known whether the writ is fineable, and declarations *by the by* will be without fine. Also the baile must not be liable to a second return, nor be an appearance to a stranger: otherwise the writ will remain still.

It is very fit to consider, whether the enhancing of the charge of going to law in the king's-bench will be allowed by parliament, though it abate the charge in the common bench; and whether, when both courts are chargeable, the new-erected courts at Stepney Southwark London and the Marshalsea will thereby grow larger by their cheapness, which are now in the measure ballanced by the cheapness of proceedings in

FIFTH

FIFTH PROPOSAL.

The fifth proposal is, since the great difference ariseth upon the account of special bail, whether there might be some such expedient thought of, as might take away that culy.

I must confes I never understood, that special bail was any considerable convenience to the subject, considering the trouble expence delay and incumbrance that it occasions. I think it were better for both, that a warrant of an apprehension should be subscribed by the prisoner in the presence of an attorney, and not to be countermanded. But this the apprehension of creditors will not digest; and if it should be enacted, it must be from a time to come.

But it should be enacted, that if any man should by his writ or declaration demand debt or damages, and should not recover, the defendant should have his full costs and damages for his imprisonment; and that if he should recover, if he had his writ or declaration 10l. more debt or damages than he recovers, he should have no costs; and that pledges be given *de prosequendo*: and then there would be very little to be said about special bail, but when there is real cause for it, whatever be done in this kind, yet certainly the writ of *habeas corpus* or bill of Middlesex must be special in the body of the writ, and that settled by act of parliament, and not with a general writ, and that settled by act of parliament, and not with a general writ of an *ac etiam*, which is very incongruous.

A
DISCOURSE
AGAINST THE
JURISDICTION
OF THE
KING'S - BENCH
OVER
WALS,
BY
JOSEPH OF LATITAT.

manuscript, from which this Discourse is printed, fell accidentally
the editor's hands. He purchased it at a bookseller's on barely
enough of the contents to see that the subject was interesting;
it was an agreeable surprise to him afterwards, when on a care-
ful perusal he found himself possessed of an argument, which appear-
ed to him to have very great merit, and to be in a state fit for publi-
cation. The editor is not aware, at present, who was the author of
the argument. But the contents shew, that it was written about the
year 1745. As to the title of the argument, it is the editor's, the
manuscript itself being without one.]

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A
DISCOURSE
AGAINST THE
JURISDICTION
OF THE
KING'S-BENCH OVER WALES,
BY
PROCESS OF LATITAT.

DURING my attendance in the court of king's-bench
last Michaelmas term *, I heard the case of Lampley
Thomas argued; wherein the only point discussed was,
whether a *latitat* out of that court could run into Wales, which
was a question upon a plea to the jurisdiction. I confess I
thought it strange, that a question of jurisdiction over so large a
country should then be started for the first time; especially as
it had been united to the kingdom above two hundred years,
and no alteration had been made in the laws of that country with
respect to the administration or justice since 34. and 35. of H. 8.
It seemed to me a point of some curiosity; and I thought it
worth while to examine a little more minutely into the state and con-
dition of that country, not only since that last mentioned statute, but
from

* Term 13. G. 2. In 1. Will. 193. there is a report of the argument in the
REPORT.

from the time of E. 1. who made an entire conquest of it, in order to see, whether the king's-bench had in truth any authority for the exercise of that jurisdiction, which they are now for the first time to establish. And I must confess, upon the strictest search I could make, and a serious consideration of arguments as authority, this pretence of jurisdiction in the king's-bench appears to me to be not only unwarranted by law precedent, but clearly opposed and contradicted by both. — I had taken some pains in collecting the cases upon which I for this opinion, I thought it would not be an unuseful exercise, and no other employment, to collect together in the form of an argument the reasons and authorities that prevailed over my judgment.

It will be necessary in order to state this matter fully to run the history of Wales, so far as it relates to the jurisdiction, from the time of E. 1. to this day. This takes in two remarkable periods of time; the first from the time of its conquest in 1282 to the 27. H. 8. and 34. and 35. H. 8. when the union of it with England was established by parliament: the second begins with that last statute, and goes down to the present time.

But before I enter upon this disquisition, I shall just take notice of the condition of that principality before the conquest, in order to give some answer to an argument Mr. Evans * used to the jurisdiction of the king's-bench in Wales even more ancient than the time of its conquest; for he took it for granted, that the princes of Wales had always been subject to the kings of England and part of the same realm; and because Edward the first, when he took David prisoner (who was the brother of Llewellyn, the last reigning prince of that British race) had him tried and executed as a traitor, he inferred from thence, not only that David was Edward's subject, and consequently liable to suffer so infamous a punishment; but that likewise he was tried in the court of the king's-bench, and condemned there by virtue of their jurisdiction in Wales.

This without doubt is a very groundless conceit; for, without the right of superiority the kings of England had over the princes, yet they never claimed more than that feudal lordship which consisted in homage, tribute, and jurisdiction, where the prince himself was party, and had any contention with his vassals and great lords. That the English kings did in fact exercise this sovereignty is apparent; and it is as apparent, that

* One of the counsel who argued for the jurisdiction of the king's-bench in Wales, was Mr. Lewis, and Thomas, EDITOR.

princes, as often as they durst, disclaimed such dependence and never submitted thereunto but by compulsion and enforcement. But without entering into a discussion about Edward's title (which by the by it would be hard to support), thus at least is clear, that this claim of sovereignty over the had nothing to do with the ordinary administration of justice in either kingdom; for this subjection was due not to the crown, but only to the crown of England; and both countries, tho' united under one head, remained two distinct realms, absolutely independent of each other.

There is a very curious record extant, which will be very material for this purpose, and is at large in a book of the Welsh published not long ago by Dr. Wotton*. This record contains a commission to examine witnesses in Wales, together with depositions touching some points on which Edward meant to establish this right of sovereignty. This commission was executed in the 9th year of his reign, three years before the conquest. The commissioners, the bishop of St. David's, Reginald Grey, and Walter de Hopton, sat in Chester, Montgomery, White Monastery, and in Lamberdower, in Cardiganshire; and all under the dominion of the king of England; and the examinations were taken without summoning the prince of Wales, without examining, as appears, any of his subjects. Besides it is very probable, that the commissioners took care to select persons for examination, as were most favourable to Edward's claim. Now, notwithstanding all these marks of partiality and injustice which attend this proceeding, yet the contrariety of evidence (for such there is) makes one strongly suspect, that Edward's pretended right was no better than usurpation.

The principal heads of enquiry in this examination, to state shortly, were,
 first, what right Edward had to determine matters in difference between the prince and his barons, or between the barons themselves.
 secondly, in whom the power of making laws was invested.
 thirdly, how far the English method of trial by jury had been introduced into practice among the Welsh.
 The meaning of this last may not appear so material at first sight. But the argument drawn from it was of great service to Edward; who, like all other ambitious princes, was desirous to cover over his usurpation with some appearance of justice. For in fact this method of trial, which was peculiar to England,

* See Wott. Leg. Wall. 518. to 531. in Append.—EDITOR.

and

and very different from the method of trial by the Welsh had been introduced into that country for a considerable number of years before, this might be urged as a concurrent argument to prove that subjection to the English which Edward wanted to establish.

It must be observed here, that this king dealt afterwards with the king of Scotland in the same manner; and indeed the establishment of this paramount sovereignty over the whole seems to have been the interesting point in his reign.

But to go on with this examination under the first head, the right of exercising jurisdiction over the prince and his barons is to be observed, that the witnesses are only asked to the fact, and required to produce instances to the practice; for it would have been dangerous to have questioned them as to the right.

Now it is very true, that some instances were mentioned of disputes between the princes of Wales and their barons, and some between the barons themselves, had been determined by the king's justices. But they are but few, and those not supported by any records, but related only upon memory, and the account so defective and inaccurate, that a man at this time of day would not recover a pepper-corn upon such slight evidence.

Under the second head, the power of making or altering laws, some of the witnesses give it to the kings of England, and others as expressly to the princes of Wales.

Under the last head, touching the trials by jury, the account given is as loose and unsatisfactory as any of the rest: for some say it had been practised only of late times, others more anciently; some hold the defendant might proceed by which he thought fit; and some insist, that the lord in whose plea the plea was pending might appoint what kind of trial he pleased, and was entitled to a fine from the parties for granting the privilege of this trial *per inquisitionem*; lastly, some say the practice had been both ways, and that sometimes the jury gave their verdict without oath.

From hence one may make some conjecture on the justice of Edward's claim. But, such as it was, he thought fit to maintain it; and accordingly in the preamble to the Statute of Snowdon*, he says expressly, that this principality, which belonged to him before *jure feodi*, was now by conquest

* The 12. E. 1. commonly called *statutum Wallie* is meant, that statute being dressed in the name of the king *omnibus fidelibus suis de terra sua* SNOWDON, *et terris suis in WALLIA*. — EDITOR.

his own *jure proprietatis*, which in effect amounted to a
by escheat, as Llewellyn was dead and his brother at-

in this short account it is manifest,

in the first place, that Wales before the time of E. 1. was
part of the realm of England; and this will be made out still
clearly, when I come to consider the condition of this
country after its conquest.

secondly, that it was governed by laws of its own, which
no affinity with the laws of England.

Thirdly, that Edward's claim of jurisdiction allowed in its
extent amounted to no more than this, a power of deter-
mining all causes wherein the prince of Wales was party: and it
must be further observed, that this power was exercised not by
the ordinary jurisdiction of the king's-bench, but by special com-
mission to justices assigned to hear those particular causes; and
it appears by those depositions already mentioned, that Welsh
juries were sometimes joined in commission with the Eng-

in the last place it is certain, that Edward claimed the same
jurisdiction over the kings of Scotland, as the superior lord under
whom that kingdom was held, and accordingly did in fact sum-
mons the king of Scotland to appear before him at York, to an-
swer to a complaint made against him by one of his own sub-
jects; and although that king made some difficulty at first to
obey the precept, yet at last he did appear in person and plead-
ed. This is to be seen in a notable record in Ryley, p. 157.

As you see, that Edward's right, if it should be admitted,
amounted to no more than a feudal sovereignty over the prince of Wales
as vassal: a tenure, by which he himself held his dominions
in Normandy and Aquitaine under the king of France. And the
other princes at this day, as I conceive, hold their territories
in the same manner under the emperor as fiefs of his crown.
Therefore nothing can be more absurd than to conclude from
the subjection and homage of Wales to the king of England, as
superior lord, that the king's courts at Westminster sent their
process thither in common causes by virtue of their ordinary juris-
diction. There is no occasion, however, to teize this matter any
farther at present. How vain this pretence is, will appear, when
we come to consider the condition of this country after the conquest;
when it will be made evident, that the king's courts were not
then intitled to this jurisdiction, which Mr. Evans has in-
ferred from them with before the conquest from this single instance of
execution.

I come

I come now to consider the state and condition of Wales after its conquest, viz. from the 12. E. 1. to the 27. H. 8. when it was first united to England. And here I shall observe the following method.

- I. I shall give some account of the lordships marchers,
 1. As to their extent.
 2. The power and jurisdiction of the lords.
 3. The cases wherein the king's courts exercised jurisdiction in causes arising within these marches.

II. In the next place, I shall give an account of the Welsh shires which made up what was properly the principality and were under the immediate government of the kings of Wales; and therein state,

1. The jurisdiction exercised in those shires.
2. Their independency of the king's courts at Westminster.

I. All that country, then, which consists of the twelve counties, together with the county of Monmouth, and lordships, which by the 27. H. 8. were annexed to the counties of Salop, Hereford, and Gloucester, was then by one name, Wales; and no part of this territory was parcel of the realm of England, till the union by the statute 35. H. 8. except only Monmouth, and those other lordships were added to the English counties by 27. H. 8.

This land, at the time of the conquest, consisted partly of lordships marchers, which had been from time to time won from the Welsh, some of which were kept by the king in his own hands, and others granted to English lords, to hold of the king's land *in capite*; partly of counties, which the kings of Wales had conquered and kept in their own hands, as the counties of Cardigan, and Caermarthen, and Flint; for the county of Merioneth, which was called a county palatine, differed in no respect from a lordship marcher but in name only; and the counties, which were properly the principality of Wales, the principality was then reduced to the three shires of North Wales, the marches, and the south Wales.

The marches were, as the word signifies, the borders, and contained certain signories beyond the English line. These were, when they were conquered, granted to Englishmen, who held them of the kings of England, to be a barrier and outwork against the Welsh; and that these lords might be the better able to assemble their men together, and resist any sudden attacks, were each of them invested with regal power, which the

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as high a degree as the king himself, save only, that he was subject to his curb and controul whenever they exceeded the limits of their power. These marches were probably in the beginning, as the word imports, no more than borders. By degrees, as the English arms prevailed, and extended into the country, this tenure increased, and new marches were created as fast as they were conquered; so that in process of time these borders, which were at first no more than a line of defence to secure the English from the inroads of the Welsh, came into the very heart of Wales, and the country itself grew considerably less than its confines.

As to the extent of these marches, it appears by the statute of H. 8. that out of these only were erected five new counties, namely, Denbigh, Montgomery, and Radnor, to which will add Glamorgan, for reasons that I will mention by and by.

Besides these, many other lordships marchers, which are particularly mentioned in the statute, are annexed to the counties on the one side, and to the English on the other. These were the lordships marchers in the time of H. 8. If any one thinks this is no evidence to prove their extent in the time of E. 1. for that many might have been created since; I answer,—In the first place, it is hard to conceive, that after Wales was entirely subdued, the king should have created any new tenures of this kind, when that service was done for which they were created. In the next place, it is imagined, that the kings of England, so far from multiplying these signories, would (if they had been able) have reduced them, which already existed; for it was as much as they could do with all their power to keep those petty kings in order: there is no doubt, but H. 4. who found such difficulty in mastering Glendower and the Mortimers, who were lords of the marches, would have absolutely extinguished this tenure, if he had prevailed upon his parliament to have concurred in it; and instead of making those severe ordinances, which were against the Welsh, which were but imperfect remedies for the mischief, would have rooted out the cause of all these disorders, by destroying that great power of the lords marchers, whence they sprung. The last reason I shall give, to shew that it has been the extent of the marches in the time of Edward the first, is from the statute of Snowdon; and that statute being extended only to the counties of Cardigan and Caermarthen, together with the three shires of North Wales, it follows, that the rest of the country, which needed no regulation, was in the hands of lords marchers; for of the remaining counties, namely, Glamorgan, Brecknock, and Pembroke, the first was annexed to the county of Glamorgan, the second to the county of Brecknock, and the third to the county of Pembroke.

palatine of Chester, and the latter was then in the time of William de Valence, as a county palatine of itself. 45. 49. 210. And it is to be observed, that the statute which divides the whole territory of Wales into march counties, reckons up but six ancient shires, viz. those first mentioned, and the county of Glamorgan.

As to the county of Glamorgan, when it was first erected a county, does not appear. There is notice taken of the county in a record in the Exchequer, 4 H. 4. R. 5. the entry is in these words, *De G. P. occasionato ad respondendum tibus officii vicecomitis comitatum Glamorgan & Merioneth* that it was not a county in the time of E. 1. seemed probable, because no mention is made of it in the statute of 1284; and upon looking into Ryley, I found that this county was in the time of E. 1. a great lordship, which was given to Gilbert de Clare Earl of Gloucester, between which and Humphrey de Bohun Earl of Hereford there was a famous proceeding in the 19 E. 1. These two noblemen, it seems, disputed about a piece of land, which lay between their lands. The Earl of Hereford was lord of Breghennok, and the Earl of Gloucester was lord of Morgannon. Now, although a dispute was actually pending in the king's court concerning the right to this piece of land; yet the two earls were too powerful and independent to wait the event of the cause, and so endeavoured to obtain possession thereof by force; and, notwithstanding the prohibition once or twice repeated, continued to commit violence against each other, till at last the king summoned them to appear in parliament. The whole proceedings are at length given in Ryley, and are very curious; but there is no occasion for any further notice of it here. Now this land of the earl of Gloucester, which is called *Morgannon* throughout the whole record, is certainly the same with Glamorgan. For, to omit other reasons, such as its neighbourhood to Breghennok, and that there is no other district or honour known at this day by the name of Morgannon, besides the similitude of the names, being in two syllables, there is an express mention made of this land by the name of *Glawmorgan* in the proceeding of the same year; for, both the earls being found guilty of felonies, their liberties were seized, and a *custos* was put in each of the counties. The words are these: "*Mandetur Rogerus de Burghull & alii ad custodiend. libertat. regales in terris com. Gloucester & Morgann & etiam in terris com. Hereford de Breghennok & libertat. per judicium et considerationem totius consilii regis remanent in manu dom. regis, prout alibi patet plenius contemptus in obedientia & transgress. de quibus presens sunt convicti.*" Ryl. p. 103.

is I thought just to take notice of; because, the 27 H. 8. notice of the county of Glamorgan as one of the ancient shires: which if any man thinks, with many other observations in the course of this argument, trifling and impertinent matter in hand, I will readily confess as much; but nevertheless think I may be fairly excused, if in handling this for my own curiosity, without intending it either for the use of the Court, I play with any little matter of antiquity for my own diversion.

As much shall suffice for the extent of these lordships march-Only, before I proceed, I will just mention my authority Heretofore, that all Wales, except only the three northern shires, was in the hands of the English before the time of E. 1. It is to be noted, that before the three Welsh shires, as Glamorgan was a marcher, there were but four remaining; namely, Pembroke, which had been a county palatine under the king of England many years before, as appears in the case of *Ham de Valence*, Ryl. 210. and Flint, Cardigan, and Caermarthen. And these three last were granted by Hen. 3. to his son Edward. 1. In this patent, Flint and some other castles are named as late conquests. But the castles of Cardigan and Caermarthen are mentioned simply, without any notice taken how they had been in the king's possession. This grant of Hen. 3. is recited at large in a manuscript I have by me of lord Hale's concerning the king's prerogative. Concerning the county of Caermarthen, I have likewise picked up another testimony in the case of William de Breouse; which was about 20 years before. He claimed, it seems, *jura regalia* within the lordship of Breouse, which the justice of West Wales insisted to be within the precinct of the king's county of Caermarthen; and, being refused in the exercise of this right, he preferred his petition to the parliament against the justiciary; in answer to which claim, the king sent Warwick for the king (I do not set out the title at length), that William Breouse, the father of the present lord, after the war of Evesham, *seclam illam sibi attraxit, et regi patri domini reg. nunc subtraxit et ipsum dominum de illa seclam ad comitatum de Kermerdyn faciendam omnino exhereditavit, et jurisdictionem regalem, quam idem Wilhelmus, qui antea illam clamavit in predicta terra, super dominum regem patrem suum regis nunc usurpavit.* Ryl. 234. 236.

Being now dispatched these points of enquiry, which in my opinion are little better than mere curiosities, and yet perhaps not altogether useless in clearing up what follows, I shall draw near to the point, and consider the power and jurisdiction of the lords

lords marchers; first premising, that the marches were neither part of the realm of England, nor governed by English laws; which will be sufficiently proved from what is cited hereafter.

The lords marchers in their several signories had rights, in as high and ample manner as the king himself except only in some instances, which shall be taken notice of hereafter. And this enjoyment of royal rights consisted in the following particulars, most of which I shall state as set forth in the plea of Thomas Cornwall to a *quo warranto* brought against him for using certain franchises in his manor, which had been granted to a marcher. Co. Entr. 549. It is true, there is a demurrer to this plea in the book, but no judgment is given; and Lord Hale 4 Inst. 244. refers to this record as a notable precedent of the condition of Wales before the statute 27 H. 8. However, I don't rest upon this authority; for all the several rights mentioned will appear to be confirmed by other and better authority.

1. All writs within the signory run in the name of the lord, and were *contra pacem* of the lord. 27 H. 8. c. 24. act for recontinuing certain liberties, &c. in the crown.

2. The lord marcher had judgment of life and limb in all capital and criminal cases; and to this was annexed the power of pardoning all offences. *Ibid.*

[These two drew after them of course the forfeiture of lands, goods, and chattels of felons. Case of John de Tibitot *justic. domini regis*, R. 1. Case of Bogo de Knouvill and Roger de Montgomery 63. 27 H. 8. c. 24. 26 H. 8. c. 6.]

3. The lord marcher had a power of constituting justices of the peace within his signory. 34 and 35 H. 8.

4. He had a power of appointing justices of oyer and terminer, &c. 27 H. 8. c. 24.

5. He had a right to hold plea of all actions real, personal, and mixt, within his signory.

6. The king's writ could not run into the marches; nor could the king *intromittere* (as the expression is in the statute) into any of those liberties, for the execution of justice.

the two last heads may be reduced into one, viz. an unli-
 exempt jurisdiction in all causes arising within the signo-

consequence of this, the lords had each of them their own
 for original writs. To shew this exempt jurisdiction,
 mention in the petition of William de Breouse to the king
 is very remarkable. Ryl. 234. "Le dit Wil-
 prie a nostre seigneur le roy & a son conseil, par la ou
 home ne doit aver conusance de luy ne de sa gent de
 rt, forsque devant le corps le roy mesme." And afterwards
 readings he states his right thus: *Quæ quidem libertas &*
is tales sunt, quod ipse debeat cancellarium suum in eadem
ri habere hominibus & tenentibus suis terra prædictæ de
servicentia cum necesse fuerit, iudicium vitæ et membrorum,
cognitionem omnium placitorum tam coronæ quàm aliorum
infra dictam terram inter quascunq' personas emergen-
de terrâ in MARCHIA extra comitatum prædictum de Ker-
atra potestatem vicecomitis ejusdem comitatûs existente.

Notwithstanding this exclusive jurisdiction, there were I
 two sorts of causes, wherein the king's courts held plea,
 arose within the marches.—The first took in all con-
 cases when the lord marcher was a party, either in respect to
 ship itself or the boundaries of it.—The second compre-
 all such causes, where it was necessary to write to the
 as *quare impedit*, and all issues of marriage and bastar-
 ch were triable by the bishop's certificate; and these
 tried in the next adjoining English county.—The rea-
 by the lord marcher could not hold plea in the first cases,
 us; because then he would in effect be party and judge.
 reason why he could not try *quare impedit*, &c. was, be-
 the bishop, who was as great a man as himself, would not
 writ, and scorned to certify under any command but
 's. But why was the court of king's-bench presently to
 of these pleas? For does it follow, that, because there
 of justice in any country out of the realm of England,
 's-bench must immediately interfere to cure this defect?
 natural and proper resort in these places is to the king him-
 his council.

power, indeed, be inherent in the court, how comes it
 they have never exercised it in Jersey, Guernsey, or
 tations? Nay, why have they suffered that little town of
 to live so long undisturbed? The marches were as much
 the realm as those places. But the judges of ancient times
 more modest, and better content with their limited autho-
 in some of the modern ones have been.

These

These reasons make me subscribe to my lord Vaughan's opinion †, which is well grounded upon a case in Fitzherbert 382. 18 E. 2, that this power was given by an act of parliament and the book is express to this purpose.—A writ was taken in the county of Gloucester of the barony of Gower in Wales; a writ of error exception was taken, among other things, because by the statute of Westminster assizes must be taken in the county where the land lies, and Gower was not in any county. Scrope, who gave the rule, says,—“As to that which is said that the writ shall not be directed to the sheriff of Gloucester, and that the tenants were out of the power of the sheriff, that the tenements were not in the county, sir, I say that Gours is a barony in the marches of Wales: and I say that every barony of the marches has a chancery and its own court, so that when one of the tenants does wrong to another, the lord shall do right; but when the *baron is ousted of his inheritance*, he cannot have remedy by his own writ, because he is out of all; and therefore *it is ordained in parliament*, when the baron is ousted of all his barony in the marches of Wales, he shall go to the king to purchase remedy, and shall have a writ of the king's chancery, and the writ shall go to the sheriff of the next county.”

Now, when this act of parliament was made, or upon what occasion, or whether it provided for any other cases, does not appear; for the record of it is lost; a misfortune common to many other acts as well as this. And this is no strange thing if we consider how ancient this statute was; as old probably as the marches themselves.

This gives a fair and reasonable account of the original and uncommon jurisdiction, the trial of causes in the *next county*, which, upon this narrow foundation of one act of parliament made to provide for the inconvenience of one particular case, has now by long usage grown to be the common trial of all matters and causes without distinction arising in the marches of Wales. And whereas the only reason in those times, that could be suggested for the trial in the adjoining county, was the want of a fair and impartial jury, which could not be had in the marches, where every man was vassal to the lord, the same method was pursued in all cases, as if it was impossible to find twelve men in Wales.

This wise by the by for the court of exchequer.

But be this as it will, whether this method of trial took its origin from act of parliament or not, it is very certain, the king did exercise such jurisdiction as is abovementioned in

† Vaughan. 403.—EDITOR.

lar causes; and it is as certain, that their jurisdiction was
 ed in no other; so that these exceptions, still confirming
 eral rule, as often as they are mentioned, give it much
 er establishment, than if there had been none: for if there
 en no such exceptions, there would have been no cases in
 ocks relating to this matter; and then the judges, taking
 age of this silence and a few modern instances, would pre-
 ave determined the point in favour of themselves. This
 ave already done in the cases of the counties palatine, as I
 shew, if it were needful here. But in the present question
 are cases, which are clear and express, and they shall hear
 en presently.

I come now to consider the jurisdiction exercised in the
 shires of Wales, and to shew their independency of the
 courts at Westminster.

is jurisdiction was established by that famous statute of
 on, which was made in the 12th year of E. 1, soon after
 conquered Wales, to which I refer the reader.

erhas been some dispute, whether these laws were enacted
 English parliament, or ordained by the king himself; and
 Evans seemed to think, that, as this statute was made by
 English parliament, it would prove Wales to be a part of the
 sh realm.

in answer to this, admitting this statute to have been an
 parliament, the consequence, that Wales was therefore
 of the realm of England, will not follow; for it is plain,
 at this day the English parliament binds Ireland, Jersey,
 Guernsey, Berwick, and the plantations, if they are speci-
 named; and yet these are confessedly no parts of the realm
 England.

the next place there is great reason to believe, that this sta-
 was no act of parliament, from those circumstances menti-
 by lord Vaughan; viz. that no such parliament is found
 oned in that year, nor law made in it; nor is it likely at
 ime a parliament of England should be summoned at Rote-
 which is doubtless in Wales: to which I will add two more.
 s from the form at the end, "*In cujus rei testimonium sigil-
 nostrum est*;" a form, which I have not observed to be
 in any old act of parliament. The other is, that, as before
 onquest the king of England disputed the right of making
 in Wales with the princes, and was able to produce some
 nce in support of his claim then, as appears by the deposi-
 already mentioned, it follows, that this right after the con-
 must have remained solely in him without any contest; and
 it

is very unlikely, that he would have given up so great a prerogative to his parliament without any reason.

But to proceed, this government and jurisdiction of the palatry of this state was framed in all respects upon the plan.

The justices were constituted by like commission with the justices in England, and invested with all jurisdiction as full and extensive as well in bank, as in their circuits.

The sheriffs had the same power in their tourns and courts, and the office corresponded in all points with the sheriffalty.

They had their chancery and exchequer answerable to the king, and the methods of proceeding in all actions real and personal were the same without any variation as our methods of proceeding in England.

But there was this difference as to the extent of jurisdiction that, whereas in England the great courts of justice reach to the whole kingdom, in the Welsh shires these courts were restrained in their limits. For the three shires of North Wales were governed by the king's justices there, and their jurisdiction was bounded by these three shires; and the counties of Caermarthen and Caermerthion were each under their justices, who were confined to the exercise of their authority within those respective counties. But tho' these courts were circumscribed in their limits, yet their powers within their respective districts were as high, as ample, as unconfined, as those of the king's courts at Westminster within theirs; and if any thinks this restraint of jurisdiction any argument to prove an inferiority to the Welsh courts, the same argument would hold as strong against the English courts at present, which confessedly may do nor can send their process into Jersey or Guernsey, nay to Berwick upon Tweed.

Thus were these courts sisters of the courts of Westminster and in all respects their equals; not held in franchise or lordships marchers or counties palatine, but sprung and derived from the same source.

Now, in this light, can any thing shew more absurdity, than this pretence of superior jurisdiction in the court of king's-bench, which, in truth, is a contention of the king against himself? do I think, that any argument can be invented to give the king's-bench a superiority to one court, which may not be urged as strongly on behalf of the others.

If the court of king's-bench will say, as the lion did, that the law belongs to me, because I am stronger; the reason, I confess, is unanswerable. But one would hardly expect such brutish dealings from the grave men in fur, who have nothing in their mouths but law and justice and impartiality.

that no one may think, this equality of power and dignity is a mere *gratis dictum*, and an assertion without good proof, notwithstanding it is already sufficiently apparent from the statute of 12 Edw. 1. c. 1. I will produce another authority, which is express to the contrary, and that is in the year-book of 19 H. 6. 12.

There was a debt for rent upon a lease for years made in Mid-
 dlesex, of land in the duchy of Lancaster, to which the defendant
 pleaded a local plea, that the plaintiff entered upon him and
 his lands. The doubt was, whether this issue should be tried
 in the next adjoining county, or sent down into the duchy. In
 the state of this case the counsel fell upon a discourse concern-
 ing Wales; for the reason urged, why in this case the issue
 should be tried in the county adjoining, was, because this was
 a county palatine in Wales.—Afcue, whose business it was to distin-
 guish Wales from a county palatine, says this: "If erroneous
 judgment should be given in a county palatine, as in Durham,
 this shall be redressed here at common law. But if there
 be error in any judgment in Wales, this cannot be amended in
 the king's bench, *except only in parliament; which proves that this
 court has no jurisdiction there, &c.* So it seems there is a great
 diversity between Wales and a county palatine."—In answer
 to this, Newton says, "As to what is said, that error made in
 a county palatine shall be redressed here, and error made in
 Wales shall be amended in parliament and not here, and that
 in this cause there shall be diversity between Wales and a
 county palatine; Sir, this is not the diversity; for the reason
 why error made in counties palatine shall be redressed here, is
 because it is a higher court; but in Wales, if error be made
 before the court of any lord, this shall be amended there before
 the justices errant; and if error be before the justices errant,
 it shall be amended here, *because that that court is as high as any court of the king except the
 court of parliament*, it is necessary that this should be redressed
 here; and so to my understanding, if the justices errant were
 there, the error should be redressed here in the king's
 bench."

This is a very strong authority coming out of the mouth
 of a man whose point was to prove Wales was within the jurisdic-
 tion of the king's bench. You will observe the fact, that
 the error lay not to the king's-bench but to the parliament,
 and was corrected by both. They differ only in the conclusion drawn
 from the fact. Afcue, who spoke against the jurisdiction, cited this
 case to maintain the difference, which Fortescue had laid
 down before in the same case, "that Wales was a kingdom
 by itself, but that Lancaster, Chester, and Durham,
 were derived out of the crown, and were once at common
 law."

"law all one kingdom." Newton, on the other hand, this consequence; for, says he in effect, the error of the *ces errant* would not be redressed here, even though Wales been derived out of this crown, and remained parcel of the realm. Why? Because both courts are equal, and errors may be always brought from an inferior to a superior court. without dispute, what both asserted was true; with this difference, that *Ascue's* was a sound argument to prove his point. Newton's had this fault, that it was a better for his opponent than himself, and might have been thus retorted upon him. Sir, admitting your reason to be the right one, though it is of some use to refute the diversity which I took between the county palatine, it will yet establish another diversity between them, which will be as material to my purpose, as destructive of yours. Our dispute is, where this issue is to be tried. You say, the adjoining county; because the practice is in Wales. We say, that Wales is equal to the county palatine in this respect from the county palatine. You say, Now the reason you have given is an unanswerable argument, why the record cannot be sent into Wales; the judges in Wales are equal with those in England, and will not receive the record sent by such hands. But this is not the case in the counties palatine, because the court there is superior to this, inasmuch as writs of error lie hither from thence; the record ought in this case to be sent thither to be tried, they must obey our commands, as they are subordinate to us.

But, to let alone this minute examination, this case is sufficient to shew, that writs of error came out of Wales into the county palatine without any regard to this mighty court of king's-bench, and Newton, who argued to prove Wales within their jurisdiction, does acknowledge the court before the justices in Wales as high as any court of the king, except the court of parliament.

This equality of the courts, equal in power and command, and representing the same king in equal degree, I desire to be heedfully attended to, for upon this hinge the present dispute does principally turn; and although it has not been the subject of this argument, it is of great weight and consideration. I observe this argument has ever in the books been started in that case of *Cardiff bridge*, and others; and it was then treated with such scorn, that I fear it will not gain reception. "Certain orders of justices made pursuant to a private act of parliament for repairing *Cardiff bridge* were removed by *certiorari*; and one objection was made, that the king's-bench could not send a *certiorari* to the justices of peace in

use it may be as the king's-bench over and them and them final jurisdiction this difference from the consequence never established by the time of the king was passed and unequal to the king's-bench pleased.

Prerogative. And the last of the law.

jurisdiction against the king's writ. The king's writ is the king's writ now as to the king's writ in the king's writ and quare in the king's writ principal persons, and the reason, the king's writ in the king's writ that which provided in the king's writ subjects bastards.

in may be in the king's writ, it will be the king's writ under the king's writ of the king's writ demandable.

report of the king's writ, 12 W. 3. m. 580, and the king's writ.

use it may be sent by the court of grand sessions, which as the king's bench, and which by this means was skip- over and rendered useless. Now it is the constant practice and them into the counties palatine : and yet they have final jurisdiction. The counsel for the Welsh jurisdiction this differed, for the jurisdiction of counties palatine were removed from the crown. But this was not regarded*."

the consequence of all this is, that the king's courts at West- never exercised jurisdiction in any causes arising within principality, (and this I will be bound to affirm they did not) the time of E. 1 to H. 8. except only in such cases where the king was party ; for it must be observed, that it was an ancient and unquestionable prerogative, which no exception could be made for the king to try his own causes in his own courts, and deal with them as he pleased. This was lord Hale's opinion in that book

Prerogative † 450, and he cites many records to prove it. And this explains those two notes in Fitzherbert. "The lands in Wales, that are held of the king immediately, are pleadable in England." Hil. 6 Hen. 5, Jurisdic. 34.—" *Quare impedit* brought by the king against an abbot. POLE, the church is in Wales, where the king's writ runs not ; judgment, &c. *et non allocatur* ; because the king was party." Pasch. 15 E. 3 Ibid. 24.

Now as to the two sorts of causes whereof the king's courts were in the marches, viz. such wherein the lords were parties, and *quare impedit*, &c. The first sort could have no place in the principality, inasmuch as the king's justices were indifferent persons, and dealt justice impartially to all. And as to the second sort, which made it necessary for the king's-bench to sit in the marches, could not hold here ; for the writ, *quare impedit*, awarded to the bishops, was as much the king's as that which issued out of the king's-bench ; and it is expressed in the statute of Snowdon, that, if the deforcement be of bastardy, the bishop shall write *ad capitalem justiciarii principatus*.

It may be observed the difference between the shires and the marches ; upon which difference, if the following rule be established, it will be a clue to lead the reader thro' all the year-books under this head ; viz. that when *quare impedit* are awarded to the king, or lie of churches in Wales, or lands in Wales are said to be demandable in the king's-bench, you must always un-

derstand the report of Cardiff-bridge's case is from 1 Salk. 146. That case was in 12 W. 3, whilst lord Holt was chief Justice. The same case is in 12 Mod. 403.—EDITOR.

Lord Hale's Treatise on the Prerogative is not in print.—EDITOR.

22 E. 3. 20.
le Roy ne
grant fran-
chise en-
countre
lui-meme.
Hal. Pre-
rog. 452.

derstand

derstand those churches to be within the marches, and that to belong to the lords marches. This will clear up a confusion in the books, which has arisen from hence, that all this country, both shires and marchers, were called by name *Wales*, the cases put are of lands and churches in general, without distinguishing between the shires and marches.

I will now produce the cases to prove these points.

Fitz. Jurisd. 13 E. 3. 23.

Writ of coignage for the castle and common of J. in *Wales*. Plea the jurisdiction.—PARNING. “Three things give jurisdiction here; one because the original writ was directed to the sheriff of Hereford, who testified that he had summoned (a); another, because the tenant comes and affirms the summons; and the third, that a view had been had.” And afterwards it was said to PARNING, that he should say something else, if he could give the court jurisdiction.” And then WODSTOCK says, that the castle and commote was a great signory, and held in chief of the king; upon which the defendant pleads, and prays aid of the king (b).

47 Edw. 3. 5.

William de Cossington and his wife brought a writ of dower, and the writ was to have reasonable dower of the lands of husband of the lands of Gower (c) in *Wales*.

30 H. 6.

PRISOT says, of churches in *Wales* *quare impedit* shall be brought here, and yet the lands and other within *Wales* shall be determined before the steward of the lords of *Wales*, unless it be of land between the lords (d).

(a) By this it is plain that the original writ could not go into *Wales*.

(b) Observe the moment that the defendant pleads, that this land in *Wales* was a great signory, (i. e. a marcher) the defendant pleads for if this land had laid in the king's plea would have been good.

(c) Note, this Gower was a marcher belonging to William de Cossington in the cause last mentioned. Brook's note upon this Jurisd. says, that the earl of Warwick was lord of the signory, so that justice could be done in *Wales*.

(d) Here *Wales* evidently means the marches; for the jurisdiction of the lord steward, and the exceptions of the lands, between the lords, and any possibility be applied to the king's plea in *Wales*.

35 H. 6. 34.

RESCUE. "There are
manners of franchises;
in Wales, *where the king's
does not run*; for if *præ-
quid reddat* be brought
of lands in Wales, if
every is had of these, it
and *coram non ju-
for it is not parcel of the
of England, and there-
this court has no jurisdic-
there, unless it be of ad-
ons; for quare impedit
be brought here of
ches in Wales, and shall
ed in the county ad-
because the justices
obey no man there."*

3 E. 13. 19.

impedit of a church in
inst the bishop of St.
defendant comes and
the wrong and force,
pleads to the jurisdic-
he says the manor (*f*)
the marches of Wales,
the king's writ runs not.
a fine had been levied
manor in the common-
and after the defendant
his plea.

11 H. 6. 3.

impedit, and to all the
libil was returned; and
ame to be a question,
the king should have
to the bishop.

R. "The church is
island of Guernsey,
is a royal franchise,
in the queen's hands.
e has franchise royal;
action ought to have

(e) Note, lord Vaughan reads *bishops*.

(f) This manor seems to have been a
marcher; for in the end of the case, by
way of precedent, HERLE says, a fine
was levied here of land in Gours, and
the sheriff of Salop did the office; and
the king's escheator on this side Trent
shall seize the baronies in Wales after the
death of the lords.

Note, there were escheators in the
shires of Wales,

" been

“ been commenced there : and
 “ the queen’s justice shall a-
 “ ward a writ to the bishop.”

DANBY. “ *Quare (g) im-*
 “ *pedit* is not maintainable in
 “ any franchise royal ; because
 “ they cannot award a writ to
 “ the bishop : for if a church
 “ be in Wales, which is out of
 “ the jurisdiction of the com-
 “ mon law, the prince cannot
 “ award a writ to the bishop ;
 “ and for this cause the writ
 “ shall be brought here. But
 “ other actions are not maintain-
 “ able here for things done in
 “ Wales, for the reason as
 “ above.”

CHANT. “ In Durham, *qua-*
 “ *re impedit* is maintainable,
 “ and writ shall be awarded to
 “ the bishop in the same court,
 “ and so in any other franchise.
 “ In the same manner here,
 “ it is a franchise royal.”

NEWTON. “ In Wales, no
 “ *quare impedit* shall be main-
 “ tained, but shall be brought
 “ here ; for although the justi-
 “ ces in Wales award a writ to
 “ the bishop, *he will obey none*
 “ *but the king*, and the bishop
 “ has franchise royal as well as
 “ the prince, and holds imme-
 “ diately of the king, as the
 “ prince does, so they will not
 “ obey.”

STRANGE. “ It has been
 “ used to have a *quare impedit*
 “ in Wales, and to have a writ
 “ to the bishop ; and the bishop
 “ shall serve it ; and this I have
 “ often seen.”

DANBY and MARTIN said,
 “ that it could not be maintain-
 “ ed only in the king’s court.
 “ — *Idco quare.*”

(g) In *quare impedit*, although
 chise is challenged, it is not
 because that execution cannot
 in a franchise. *Per Moun-*
 3. 1.

Observe from this and
 cases, that the only real
impedit could not be brought
 chise or peculiar jurisdiction
 cause the bishop would
 lord’s writ. Now that this
 in the principality of Wales
 from what has been already
 upon the statute of Snowdon
 what is said by Newton of
 when that statute was made
 no prince of Wales. This
 temporary title, and the
 prince of Wales could never
 alteration in the jurisdiction
 sides remarkable, that at this
 11 H. 6. when Newton
 was no prince of Wales.
 Strange contradicts him
 vouches his own experience
 sation. “ It has been used
 “ to have *quare impedit* in
 “ have a writ, to the bishop
 “ bishop shall serve it ; and
 “ often seen.”

Note, in this and the other
 constantly it is said and
 Wales is out of the realm,
 other action for cause
 can be brought here.

19 H.
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 made
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 of La
 ten ye
 rent, &c
 ke and f
 rear on
 wards the a
 And the
 fore this
 d upon h
 ne is join
 RESCUE
 record the
 county
 here.”
 TON.
 be tried
 nining, a
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 may well
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 fore the de
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 not do so.

of the case h
 before, p. 3

19 H. 6. 12. *

bet the plaintiff counts of
made by him to defen-
such a vill in the county
Middlesex of lands in the
of Lancaster, for the
ten years, rendering so
rent, &c. payable at such
&c. and for so much there
rear on such a day, and
wards the action accrued to
And the defendant says,
fore this day the plaintiff
upon him; and upon
he is joined.

RESCUE prayed, "that
record should be sent into
county palatine, to be
there."

TON. "It seems it
he tried in the county
ining, as it shall be, if
and was in Wales; for
such trial ought to be in
county of Hereford, or
adjoining."

RESCUE. "Sir, *there is a
diversity between Wales,
was a kingdom of itself,
Lancaster, Chester, and
ham, which were derived
of the crown, and were
at common law all one
dom, and now are coun-
palatine. For to these the
may well send the record
tried; because he could do
fore the derivation. But
cannot send it to Wales,
se that at common law he
not do so. And this is*

of the case here cited from the Year-book of 19 H. 6. is given and ar-
before, p. 393, but here the whole is extracted.—EDITOR.

"the

“ the reason that the *statute (b)*
 “ *wills of things pleaded in*
 “ *Wales, as a release bearing date*
 “ *there, that it shall be tried in*
 “ *the county adjoining.*”

NWETON. (i) “ Sir, if in
 “ the court of a lord of Wales a
 “ deed is pleaded bearing date
 “ in a royal signory, in this
 “ case one court has not power
 “ to write to another court to
 “ try this deed; in which case
 “ it shall be sent hither, which
 “ proves the jurisdiction of this
 “ court to extend to Wales.”

ASCUE. “ If erroneous judg-
 “ ment should be given in a
 “ county palatine, as in Dur-
 “ ham, this shall be redressed
 “ here at common law. But if
 “ there is error in any judg-
 “ ment in Wales, this cannot
 “ be amended in this kingdom,
 “ except only in parliament,
 “ which proves this court has
 “ no jurisdiction there. And
 “ the law wills, that the deed
 “ should be tried where it bears
 “ date; but in Wales it cannot
 “ be tried by the power of this
 “ court; for which reason it
 “ must be tried in the county
 “ adjoining. So it seems there
 “ is a great diversity between
 “ Wales and a county palatine,
 “ as Fortescue has well said.”

NEWTON. “ If aⁿ action of
 “ dower be sued in court of any
 “ royal signory in Wales, and
 “ they are there at issue upon *n*^o
 “ *unques accouple en loyal matri-*
 “ *monie*, now this issue is to be
 “ tried by the bishop, but the

(b) It does not appear what
 this is, that Fortescue here says
 unless it be that which Fitzherbert
 of †, and which is now lost, for
 no statute extant to maintain this

(i) If this case put by Newton
 then it must be added to the others
 mentioned, wherein the king
 hold jurisdiction in the marches

† See before p. 390.—EDIT

there has no power to
make process to the bishop
; but the king shall write
the mareschal there to
bring the record into this
court, and then we will make
process to the bishop; which
shows, that the jurisdiction
of this court extends to
Wales, as well as to counties
palatine."

FULTHORP. "If one is
touched here, and the party
says he shall be summoned
in a county palatine, we shall
make process immediately to
him. But if he is summon-
ed in Wales, we shall not
go to them in Wales, but
the sheriff of some county
joining, to summon him.
And the diversity and reason
as Fortescue has said.
Therefore," &c.

NEWTON. "As to what is
said, that error made in the
county palatine shall be re-
dressed here, and error made
in Wales shall be amended
in the parliament, and not
here, and that for this cause
there shall be a diversity be-
tween Wales and county pa-
latine: Sir, this is not the
diversity. For the reason that
error made in counties pala-
tine shall be *redressed here is,*
because it is a higher court:
in Wales, if error is
made in the court of any
lord, this shall be redressed
there; and if error be before
justices errant, *because*
that court is as high as
court of the king, except
parliament, it is neces-
sary that this should be re-
dressed there; and so to my
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(1) Note, this case here mentioned
and that put before by Newton are the
only instances I have met with where
the king's writ ever entered Wales. For
it is very remarkable, that, in *quare*
impeditis, and disputes between the lords
themselves, and the case cited afterwards
by Fulthorpe of foreign vouchers, all the
process went no further than the adjoin-
ing county; and the reason given is,
because the court has no power to go
further.

“ understanding, if justices errant were not there, the error should be redressed here in the king's court. And, Sir, *when the manor of Burgavenny was lately demanded here, the writ was directed to the sheriff of Hereford to summon the tenant in the same manor, which was in Wales; and so it seems that Wales and counties palatine are of one nature: in which case, the issue at bar shall be tried by the county adjoining to the county palatine, and not in the county palatine.*”

ASCUE. “ To my intent, always at common law the king's justices could send to the county palatine to try any thing done there. But because that by such trial the party had delay, 9 E. 3. was made, that when any deed, bearing date in any franchise in the kingdom, where the king's writ does not run, should be pleaded, this should be tried where the writ was brought. The same statute proves, that it extends not to deeds bearing date in Wales; but all such deeds, and all other things alledged in Wales, shall be tried in the next county adjoining, by the law; because that otherwise right should fail to the party, in as much as it cannot be tried in Wales by the authority of this court. But this court has power to send to the lord of the county palatine to try any thing done within his county palatine, and to certify it here; and this has been often done. Wherefore Wales

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† Hen. 6.

Action

bond; plea, "conditions performed in bishoprick of Durham."—Same point argued again, no notice taken of Wales. Three expedients—1. To send the record into county palatine, tried there, and remanded.—2. To try where pleaded by the equity of 9 E. 3. c. 4—3. Common jury from the franchise to try it at bar.

H. 6. 6. Action of debt against gaoler of cinque ports for letting A. at large, who was in prison to the plaintiff upon judgment recovered against him there. *Nul tiel record* pleaded. The constable of Dover to certify, &c.—Objection, that the court could not write to the constable.—PRISON, C. I. C. B. who gives the rule: "Of churches in Wales *quare impedit* shall be brought here, and yet the lands and all other things within Wales shall be determined before the steward of the lords of Wales, unless it be of land between the lords."

H. 6. 25. Debt against two executors; plea, that testator made them and one I. executors I administered at D. in bishopric of Durham, and is now living, but not named in the writ. *Writ, I. did not administer.*—Issue joined. Adjourned into exchequer chamber, to know how this issue. FORTESCUE.—"In your case, if such foreign pleas should be alledged in Wales or in Ireland, I understand they are good pleas: but in these cases it shall be tried where the writ is brought by the common law; for these lands were never ruled according to the course of the common law of England. At some time Chester, Lancaster, and Durham, were at common law: and although the king has made them counties palatine, as he may without parliament, yet the king without parliament cannot *prendre son lige homme*; for the plea pleaded in the county palatine shall be inconvenient to be tried where the writ is brought, because that within the county palatine there are divers courts, which have divers powers to try such issue, and they ought in such cases to obey the king's writ; as they have done; as in case that one of county palatine is vouched in common place, the parcel shall be sent thither; and when it is determined there, then it shall be remanded here. But no process can be made, nor ever was made, to Wales or to Ireland, withstanding they are under the king's obedience."—And this not denied.—FORTESCUE gives the rule. It seems to us all, that it is more convenient that this matter pleaded shall be tried in the county palatine of Durham, and after sent thither."

H. 6. 33. In assize tenant made title, and demandant pleaded recovery. In answer, testified, four acres were in the five ports.—Adjourned into the exchequer chamber. FORTESCUE, Ch. Just. B. R. gave the rule, and awarded assize of remainder. "There are," says he, "divers manners of franchises.—One in Wales, where the king's writ runs not; if *præcipe quodd reddat* is brought here of land in Wales, if recovery is had of this, it is not, and, *coram non iudice*; for it is not parcel of the realm of England; and therefore this court has no jurisdiction there, unless it be of advowsons, for a *quare impedit* shall be brought of churches in Wales, and shall be sued in the county adjoining, because that the justices shall not obey any man there. Another franchise in county palatine, as Durham or Chester, which is of another nature than Wales is; for if one vouches to warranty another in Chester, *meas ad auxiliandum* shall not issue in the county palatine, but a special writ shall issue to the lord of the franchise to make proclamation to her or him, &c. by this means a judgment shall be had to recover in value here of land within county palatine, and so it cannot be had in Wales.—Another is of ancient demesne. If action is brought in this court of land in ancient demesne, and judgment had, upon this the land is become frank free, and recovery is sufficient enough, and of such recovery the lord of ancient demesne may have of deceit to recover back his seignory, and such franchise pursues the tenancy.—Another franchise is the five ports; and if action is brought of land in the five ports, and judgment had upon this, the recovery is sufficient enough to my intent, and shall not be defeated by deceit; and yet at another time it shall not be impleadable, if exception shall be made of this in another action, for it is like the case of consuance," &c. And afterwards he says, "that one franchise claimed in five ports is, that if any minister of the king comes within the franchise to assist any man, his head shall be broken."

H. 6. 15. Debt upon obligation made at Berwick; and because it was made at Berwick where this court has no consuance, it was awarded that he should take nothing by his writ. PREROG. 23. The prince within his principality, and the lords marchers within their marches, had *jura regalia* †.

is the year-book referred to; but it seems an error, and that it should be *bishops* instead of *princes*.—EDITOR.

we follow in the manuscript several passages continuing the extract from Lord Hale's Treatise of the Prerogative; but as they are chiefly in short-hand, I could not decypher them.

Under this last case these things are worthy observation.

1. That the cases put on both sides seem to be good law, are uncontradicted; for the council do not differ about the themselves, but only in the inferences drawn from them.

2. That whereas the point to be established on one side, in general, that the king's courts had jurisdiction in Wales, cases brought to maintain it are cases in the marches only, none in the principality.

3. That the law is, and always has been, as Fortescue on this side contended; and no instance can be given where a plea of this kind, arising within the county palatine, has been tried in the county adjoining.

4. We may observe from hence a very material difference between the lordships marches and the counties palatine, in particulars:

1. The writ of error did not lie from the marches to the king's-bench, but did from the county palatine.

2. If foreign plea or voucher arising in the county palatine was pleaded in the king's courts, the record was sent into the county to be tried, and afterwards returned into the king's court for judgment. But in Wales the record in such cases went no further than in the adjoining county. This difference arose from hence, that the counties palatine were parcel of the realm, and derived originally out of the crown of England, but Wales never was.

To conclude this head, I will cite lord Coke's comment on *cap. 12. of Magna Charta* upon these words, that affizes shall not be taken but *in suis comitatibus*. 2 Inst. 25.

"Yet in some case, notwithstanding this negative statute, affizes should not have been taken in his proper county; therefore if a man be disseised of a commote or lordship in Wales holden of the king *in capite*, as for example, Gowre, the writ of affize should have been directed to the sheriff of Gloucester within the realm of England; and the land of Gowre was out of the power of the sheriff of Gloucester, being out of his county, within the dominion of Wales, and this statute says the affize shall not be taken in his proper county; yet was the affize taken in the county of Gloucester, and judgment thereupon given and affirmed in a writ of error. And the reason is notable; for the marcher, though he had *jura regalia*, yet could not sue twice in his own case; and if he should not have remedy in his case by the king's writ, he should have right, and no remedy by law given for the wrong done unto him, which the law would not suffer."

Brooke, title *Cinque Ports* and *County Palatine* 8. in abridging the case of 19 H. 6. 22. writes in margent, *Nota* Fortescue; and after giving the case, observes, "It seems they would have adjudged the case, if it had not been for New-ton's opinion; for all were against him, and *lex contra Newton, ut mihi videtur.*"

Hale's Prerog. 460. *Habeas corpus* lies into Wales, five ports, London, or county Palatine, and this often resolved, partly in respect of the interest the king has in his subject, partly because there is no other means to examine whether his commitment be legal.

the case, here alluded to, is the case of 18 E. 2. before cited and is in Fitz. Afs. 382. But lord Coke takes no notice of it of parliament there mentioned.

Thus have I brought down the history of the Welsh jurisdiction in the shires and marches to the time of H. 8. when the statute of union was made; during all which time it is as clear as day,—that Wales was not parcel of the realm of England: it was ruled and ordered by its own laws and customs, independent of the realm of England:—that the king's courts at Westminster assumed no jurisdiction over it, except in those few cases mentioned, and that only in the marches; and that these provisions do all of them prove the generality of that rule, that the king's writ runs not into Wales in all other cases whatsoever: that the king's courts at Westminster exercised no jurisdiction in the shires, either concurrent or superintendant; but the king's justices there were equal in dignity and power with the king's justices here, and absolutely independent of them.

It has been the longer upon this part of the case, because Mr. [Name] in his argument took it for granted, that Wales had always been part of this realm, which was most ignorantly advanced without any shadow of authority or argument to support it. On this groundless assertion concluding that the king's courts always had jurisdiction there, he presently applied that rule, that the jurisdiction of the king can never be taken without express words, to this case of Wales. But if the king's bench never had jurisdiction there, as in truth it never had, when this rule is misapplied, and the argument drawn from it, the application fails in its very foundation. Now that the king's courts had no such jurisdiction before the 27 H. 8. has been abundantly proved.

The next thing to be considered is, whether this statute or any other has given this jurisdiction to the king's-bench. And here I leave to reverse the argument, and demand of them by what *express words* they claim this jurisdiction. If they ever had it, I will allow them the benefit of their favourite maxim, but it will not be wrested from them without *express words*. Otherwise this rule is nothing to the purpose.

To proceed: The 27 H. 8. c. 26. unites Wales to the realm of England.—At this time I confess it became part of the same realm; but the consequence that followed from hence, if no more had been done, would have been, that from that time all acts of parliament made in England would have bound Wales without naming

naming it; but as for laws and jurisdictions, they would remain as they did before.

In the next place, all Welshmen are made inheritable laws and customs of England.—Upon this I must observe, the laws and customs of a country, and the authority by which those laws are executed, (which I call jurisdiction) are two different things; for although it is very true the word *laws* without any impropriety be used in a large sense to comprehend both, yet every body sees, that in many cases they are distinct things, and must be considered separately: for as it is said the power of making *laws* is vested in the three estates of the kingdom, the word *laws* can never include that law which gives the legislative power; so where the king and his ministers are called the executors of the *laws*, the law by which they and his ministers execute all other laws can never be comprehended under those laws which are so executed. The use of this is to shew that the laws of England, introduced by statute into Wales, were the laws in this restrained sense, that they did not touch in any degree the execution, power of jurisdiction. And that it may not be said that this is a novelty of my own invention, I will cite the 10th section of an act at length to prove it.

“And that justice shall be ministered, used, exercised, executed unto the king’s subjects in the *said shires* of Brecknock, Radnor, Montgomery, and Denbigh, according to the laws and statutes of this realm of England, and according to such other customs and laws now used in Wales afore said, the king our sovereign lord and his most honourable council shall allow and think expedient, requisite, and necessary, such *justice* or *justices* as shall be thereunto appointed by the sovereign lord the king, and after such *form and fashion* as *justice is used and exercised* to the king’s subjects within the *shires* of North-Wales.”

The *said shires* in this section were the new-created shires.

If it should be asked, now, by what laws under this act shall Wales be governed? the answer is clear: By the laws and statutes of England.—If it should be asked further, by what laws shall these laws be administered? By the king’s justiciary.—what form and fashion? After the same as is used in the shires of North-Wales.

These shires of North-Wales were, as I have observed, the remnant of the dominions belonging to the old princes of Wales. They were governed by the king’s justice under the direction of the statute of Snowdon; and not lying, as it seems, so much ex-

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neighbourhood of the Lordships marchers as the other shires, had been infected with that riotous disposition which the inhabitants of the marches had contracted; for it is natural to suppose, the clashing rights of so many petty sovereigns bordering each other, must have produced infinite tumults and disorders. Accordingly, I find a clause of this very act to preserve *laudable laws, usages, and customs* in these three shires*; in an act made the year before to make all offences in the shires and other places of Wales triable in the next English shire, there is a section to † empower the justices of North Wales to try all crimes committed in the county of Merioneth, the counties of Caernarvon or Anglesea. It seems Merioneth more open to the marches; for Caernarvon, as I take it, well defended from them by difficult mountains hard of access.

This is a mere conjecture, and I will not vouch for the truth of it.

But be this as it may, the new government, erected in those shires made out of the marches, is referred by this act to the same fashion used in North Wales. This was to be their standard. If it be now asked what that was? It has already been said, and need not be repeated. By this act the *form and manner* of administering the laws there continued the same. No new justices are appointed there, no jurisdiction erected, no new mode of proceeding established. Nay, the laws, usages, and customs are sacred, by an express clause made in their favour; to the administration of justice there, are all the counties of Wales referred, as to their standard.

What shall we say then to this pretended right of the king's shires? Where can it be found? To what purpose will it be to them to harp upon that old rule, that their court is not to be ousted of their jurisdiction without negative words, when they had any jurisdiction there of which they could be ousted. 'Tis such, as if a man should complain of a thief robbing him of what he never had. Let them shew but one instant of time, when they were seized of this right, and the point is given up. Yet this argument is the main pillar and support of their pretensions; so that the chief justice upon the last argument, having heard both sides with great attention, did at last with wonderful gravity and composure of countenance let fall his sentence, "It will be hard to oust this court of its jurisdiction without express words."

To make the point clearer, I will collect the clauses and sections in the act together, as they follow each other in order: that the design and intention of the whole may be seen, as far as it relates to this question.

* Sect. 31 of 27 H. 8. c. 26.—EDITOR.

† Sect. 12 of 26 H. 8. c. 6.—EDITOR.

First,

First, Wales is incorporated with England, and made of this realm.

Secondly, all persons born in Wales are entitled to the benefit of the privileges and laws of England.

Then the marches are cantoned out, and made into counties. And first the county of Monmouth is created and made an English county; Monmouth is the county town, and the sessions of the peace are to be held there. What follows? Is there anything wanting? Yes; it is necessary to settle the form of proceeding; that had not been provided for.

The act then proceeds to enumerate many particulars minutely.

All actions, real, personal, or mixed, "shall be sued by original writ of the king's high court of chancery in England, and heard and determined before the king's justices of assize, or *nisi prius*."

"The king's justices of his bench, or common bench at Westminster, shall have full power and authority to direct in what manner of process to the sheriff and all other officers of the said county; and to direct writs of *venire facias*, and commissions of *nisi prius*."

The sheriff of the said county shall hold writs of replevin, and all other suits and complaints under forty shillings.

The subjects and inhabitants shall be obedient and attached to the lord chancellor of England, the king's justices, and the king's most honourable council.

The sheriffs, escheators, and coroners, shall be bound to execute all process, and make due returns thereof.

Here I allow, that the king's-bench may shew express authority for their jurisdiction. The grant is full and clear. But the particular care in penning this clause seems to intimate very clearly, that the jurisdiction *before* was the reverse of what is *now*; that no writs issued out of the chancery; that no writs were heard or determined by the justices of the assize; that the justices at Westminster had no power to direct process; that there no *venires*, no commissions of *nisi prius* ran; that the inhabitants were not obedient to the chancellor or judges; that the escheators, and other officers there, were not bound to execute any of their writs.

The statute goes on, and enacts what shall be the county court. Brecknock, makes that the county town, and appoints the county court to be held there; and then the counties of Montgomery and Denbigh are made in the same manner

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is to be done next ? Shall these, which are not made counties, be thrown under the English jurisdiction, like the county of Monmouth ? Shall the chancellor and judges send writs, and award their process here, as in Monmouth ? No. 9. "for as much as the inhabitants of the said shires of Brecknock, Radnor, Montgomery and Denbigh, be not of the same power and ability to travel out of their countries to the administration of justice at London," the statute gives to each of them a chancery and exchequer. What else ? To sect. 10. the king will appoint justices for each shire, and they shall administer justice in the same form and fashion as is used within the shires of *North Wales*.

And this, other marches are added severally to the shires of Brecknock, Carmarthen, Pembroke and Cardigan, with the same reference to *North Wales*. But as to *North Wales* itself, the single syllable is said in relation to the jurisdiction ; but the statute has left it where it found it. Only the laws and customs of that part of Wales are saved by a particular clause.

Every man now say, that the king's-bench under this act saved one foot of ground in Wales, except the county of Brecknock ? That indeed is made an English county.—The ancient thought they had made but one. But they are mistaken. All the other twelve are English counties ; and it is in vain that the legislature has taken such pains to give these poor people justice at their own homes ; the courts at Westminster will come up to town barefoot, as they have done already by the same men.—But to be serious, there is not, that I can find, in this statute which can yield an argument in favour of the king ; but the whole frame, design, and end of it, prove, that as I can judge, the very reverse. And altho' the English laws and usages are introduced into Wales, and that country is no longer a part of the realm, yet the independent and exclusive jurisdiction is kept upon the same footing it was before ; nay, as Vaughan observes †, the English courts by this act lost what they possessed before ; for, as the power of the marches was determined, that necessity, which gave occasion to the king's courts to interfere before, ceased now, and consequently the disputes between the lords, and *quare impeditis* returned home to their proper jurisdiction.

Thus pains has been taken for the sake of answering an argument in the case of Stradling and Morgan, Plowd. 207. This is this :

So much as by the statute of 27 H. 8. Wales was united to England, and all was made one realm, for this reason accounts upon statutes arising upon causes there, might before the statute of 34 and 35 of H. 8. have been sued in the king's

† Vaughan 417.—EDITOR.

" courts at Westminster. And the said clause in the
 " nance made in the 34 and 35 H. 8. being spoken
 " tively, shall not take away the jurisdiction of other courts

This argument is put very plausibly ; but the answer is, that Wales was united by this act, not wholly and absolutely the kingdom in all respects, but only to some purposes ; to send members to parliament, to be ordered by the laws of the land, and to be bound for the future by its statutes ; but the manner and fashion of proceeding, together with the jurisdiction remained, by express provision, as they were before.

I would be glad, for instance, to be informed what writ of error after 27 H. 8. and before the 34 and 35. had its course, and instead of going into parliament went to the king's-bench.—I will defy them to produce any proof to prove it.—If that had been so, what occasion was there in the statute of the 34 and 35. to make a particular provision. By the 113th section in that statute, writs of error in mixed actions are given to the king's-bench ; in personal actions to the president and council. By this they gain jurisdiction over real and mixed actions, which they never had before. What shall we say to personal actions ? The affirmative of reversal there, in the president, &c. could never have been in the king's-bench of their original jurisdiction in that respect, if they had been entitled to it before. And yet till this council and president was destroyed, and a particular clause inserted in an act of parliament, 1 W. 3. c. 27. to give the power of reversing error there in personal actions, I do not think they ever pretended to exercise it.

Again, by the 34 and 35 H. 8. sect. 80. if a foreigner or alien voucher arising in England be pleaded in Wales, it shall be tried where the action is brought. These words are affirmative, and by the ordinary jurisdiction of the king's-bench, these cases remove the record before them to try the plea, as they have always done in the counties palatine ; nay, as Newton says, they might have done this in the marches. Can they produce one book, case, or record, to prove they have exercised this in Wales since the statute ?—I am sure, at least, I find none such.

If then the king's courts at Westminster had gained power of no jurisdiction over Wales by 27 H. 8. the counsel in law will admit, that the 34 of H. 8. could give none : and this is certainly right ; for if they got nothing by the union in the first statute, the second, which established a full and perfect jurisdiction in other persons and in other courts, could never have granted them any privilege. This last statute erects the court of grand sessions ; appoints the time for holding it, and distributes the twelve counties to their several

three shires : and gives powers to hold assizes in all matters after hold assizes at all but the assizes have gone on New Town of the king's-bench, comparing the franchise, nor the bench as an assize, as well as there is a clause, puts the assize process for Wales by the assize, and, or any assize has been used should be at this clause and pressing assize could be continued when it was destroyed and weighed in the council in England assize is clear assize into Wales reserved to assize, and is made assize will be made the universality assize. I fear assize beginning assize first place, assize that are not

next, it is assize judges, or assize name. assize, if both assize the declaration assize absolutely assize first of the assize sufficiently made assize the second, assize judges, I find

three shires to each commission; and then grants to these powers to hold pleas, powers as large, as full, as uncon- in all matters criminal and civil, as the king's courts at nster hold and enjoy. Vid. s. 4. and 13. And I have at all but that if the act had been silent as to error, that t have gone directly into parliament, as it did before for on NEWTON gave, because these courts were as high as r of the king's courts. From hence appears the impro- comparing Wales with the counties palatine.—Wales nchise, nor ever was; never under the controul of the ench as an inferior court, but is equal to it in all points r, as well as dignity.

here is a clause it seems in this last statute, which, Mr. ys, puts this matter out of dispute; and that is, s. 115. ll process for urgent and weighty causes shall be directed Wales by the special commandment of the chancellor of and, or any of the king's council in England, as hereto- been used."

ould be at a loss to find out, by what logick, or rather this clause, which seems at first sight to afford a very nd pressing argument against the jurisdiction of the king's ould be converted into an argument in favour of it.— en it was done.

et and weighty causes are to signify all causes, and the ntil in England are to signify the judges, and then the ence is clear. The judges are declared by the act to have ecess into Wales in all causes heretofore, and the same reserved to them in all cases hereafter. And all this is e, and is much such reasoning as this; that if dark- ll be made to signify light, the sun would be the darkest the universe. This is so poor an argument, it is below stry. I scarce know where I shall begin to refute it, and e beginning to the end it is one heap of ignorance and y.

e first place, that urgent and weighty causes cannot mean hat are not urgent and weighty, I am even ashamed to

e next, it is not true, that the king's council here does e judges, or that the judges ever were at that time called name.

lastly, if both these explanations were right as they were the declaration of the act as to the usage heretofore would en absolutely false.

first of these proves itself, and the last has been already ciently made out in the former part of this argument.

the second, that the king's council does not in this place e judges, I shall take up a little more time in explaining this;

this; for altho' it is clear enough, that the great causes reserved to the council have nothing to do with petty affairs of the king's bench, and it would be sufficient for the purpose to shew negatively what causes they are not, yet it is easy to make out what they are. The difficulty arises hence, that the council do not at present exercise any jurisdiction over Wales; nor, as far as appears in our books, ever have since the statute, notwithstanding this clause remains unaltered to this time. Nor on the other hand have the king's bench (except the court of exchequer, which stands not upon reservation) in fact ever held plea in great and weighty causes, since this clause, from that day to this. And yet it is impossible to conceive the legislature meant nothing by this reservation; matter is, I confess, involved in some obscurity; and I do not despair of giving a reasonable interpretation of it.

In the first place it must be understood, that these words *council* are used so promiscuously in the old records, that it is quite impossible to give them any definite meaning. Sometimes they stand for the king's ordinary council, which consisted of the great officers of the kingdom with the judges. In other times they are used to signify the privy council only, of which some judges or some of them were a part. Sometimes the council joined to the house of lords were called by the name. Sometimes the house of lords alone, and very frequently the whole parliament, are intitled the king's council. Nay, in one old book-case, where the judges are called the king's council, 30 Ass. p. 38. In short, so great is the confusion in the old records from this promiscuous use of the word *council*, that lord Hale can give no other rule to ascertain its meaning than the subject matter of the record itself.

But tho' the records of former times are somewhat perplexed by this uncertain use of this term, latter ages are more precise. Powers and jurisdictions came in process of time to be settled, and words used with greater propriety. The ordinary council was sunk on the erection of the star-chamber, which retains its old name of the king's council; the lords, commons, and judges, came to be called by their proper names; only council left in H. 8's time and Mary's reign before the privy council, such as it remains even to this day, and the star-chamber which was sometimes called by this name; and I believe I might challenge any one to shew a single instance fifty years before the reign of H. 8. to the present time, that the council has ever been used to describe any body

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privy-council or the star-chamber. So much for the of this term.

Now of the power and jurisdiction of the king's council to be known then, that the king, as supreme lord, exercised an extraordinary jurisdiction in great causes the palatine earls, and lords marchers; and, when the cases of sufficient importance, held plea originally, and cause sometimes in parliament, and sometimes by personally commissioned to try that particular cause. And authority in the time of E. 1. was frequently delegated to the king's bench. The causes, which called for extraordinary cognizance, were generally the riots and turbulence of the great barons, who were too powerful to be corrected by the ordinary course of justice, together with disputes about the king's lands, which were generally attended with great disorders. Instances of these are to be met with in Ryley; and I have seen the records of those times, if they were looked into, with many more.

That of William de Valence, the king's uncle, was of the same nature. He, in right of Joan his wife, was earl of Pembroke, and claimed jurisdiction over the lordship of Haverfordwest and some other manors, which had been withdrawn from the king, by the late Queen Eleanor, who held the lordship of Haverfordwest in common with Roger Mortimer.

Upon the king's death, William de Valence preferred a petition in parliament, setting forth that he had a right to the same. *Et super hoc tradita fuit prædicta petitio, per prædictum regem, Rogero de Brabazon & sociis suis tenantibus in feodo domini regis, ut ibi fieret, quod de jure & secundum consuetudinem curie fuerit fac. &c.* Here, you see, the cause in question was assigned to the judges of the king's-bench. Upon inspecting the petition found, that the earl's petition concerned the interest of other persons as well as the king; and, therefore, as it was necessary to have all these persons before the court, an extraordinary writ issued to the constable of the king's-bench to summon all the persons concerned. This writ was made *coram nobis ubicunque, &c.* and *teste R. de Brabazon & sociis suis*. Do not let any body conclude from hence, that the court of king's-bench proceeded by virtue of their ordinary jurisdiction in this affair. The whole record and the nature of the cause itself proves the contrary. The parties appeared and pleaded; and upon issue joined, writs of *venire fac.* were issued to the justice of West Wales, to the bishop of St. David's, to the sheriff of Pembroke, and to the constable of Ha-

§ This petition is in Ryl. Plac. Parl. 211.—EDITOR.

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verford, to return each of them twelve men to try the issue *prædict.* Will. & Johanna posuerunt & consenserunt, quod *sitio præd. caperetur per homines de partibus prædictis.* that the parties come in and plead instantly to the general issue. Indeed the whole proceeding is unusual, and contrary to the common course; and it is certain, that the king's-bench could neither have sent their writs into Wales, nor summoned such a jury, but by virtue of the king's extraordinary jurisdiction delegated to them, nor, as it should seem by the entry, without the petitioner's consent. See Ryley 211.

The case of Theobald de Verdun, lord of Ewyas, a Welsh merchant, is still more material to this purpose. He was arraigned at Bergavenny *coram rege & concilio* of the king's passes and contempts *in læsionem coronæ, &c. in inquisitione se inde posuit.* Upon this, as it seems, Theobald pleaded to issue *coram ipso domino rege & concilio*, which was in parliament, and then the record was delivered to the judges of the king's-bench to be tried. *Et sciend. est, quod iudicium in prædicto placito postea coram ipso domino rege & concilio redditum, prædict. Theobaldus per consensum iudicium totius concilii committebatur gaolæ,* and his liberty was granted. Ry. p. 98. Thus the court of king's-bench tried the pleadings and judgment were in parliament; which is strong to shew, that the court did not in those cases proceed by virtue of their ordinary jurisdiction.—The great case between the earls of Gloucester and Hereford, Ry. 74. is of the same nature, and is to be found in the records of the king's-bench, upon the parliament roll.

In the case of William de Breouse abovementioned, and John de Wogan, William Mortimer, and Walter Hackliffe were assigned to try the issue, and return the whole into parliament together with other proceedings, which had been heard by the said William de Breouse *coram auditoribus Johanne de Ryngs, Willielmo Inge, Rogero de Southcote, et Waltero de Winton,* which auditors were commanded to transmit their report to J. Wogan and his companions; wherein it is to be observed, that neither Wogan and his companions, nor any of the auditors, were judges.

Upon these cases I must observe, that where the issue was commenced in parliament, and the issue sent to the king's-bench to be tried, they did not proceed by virtue of their own authority, and consequently such precedents cannot have any force to establish an ordinary jurisdiction. This is a good rule, that where the subject matter of the

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properly within the cognizance of that court, the mere trial of such causes will not give it original jurisdiction in like manner. These great causes, after trials in the king's bench, or such particular persons as he assigned for that purpose, and hence arose, as I guess, that great court of the county of Glamorgan, which was instituted to keep the lordship of Glamorgan in order, and to exercise as the king's vicegerents jurisdiction over these sturdy subjects. And thus having gotten some footing in criminal matters, they, as the judges of most courts, began presently to enlarge their bounds, without the help of a *Latitat* thrust themselves into all civil causes. So that I find in the time of James the first, 1 Roll. a motion for a prohibition there, the judges allow a writ of prohibition in all actions at common law, as debt and assumpsit, upon the case under fifty pounds, in all causes of equity, and in criminal causes. When this court was erected, or by what authority, is uncertain; not by act of parliament, and therefore it should seem by the king's sole authority: and let the advocates for the king's bench consider, that if Wales had always been a part of this realm, and under their power, how contrary to the laws and privileges of this kingdom to suffer a court to be erected without parliament, especially as, in the reign of Edward the first, the president's court of the North was created by parliament, and could not have been done any other way. The court being thus established, there was but little business left to the king and council. Most causes, except some of the highest consequence, were delegated to the president and council of all Wales. In the 34 and 35 H. 8. there is a statute saving for this court, and the words are, "they shall have full power to hear and determine such causes, &c. or such as shall hereafter be assigned to them by the king's majesty, as heretofore hath been customary and used." It is manifest, that the king hath been used heretofore to assign many causes to the president and council. Of what kind these causes were, I have mentioned before. This at the king's bench may be sure of; they were such as fell not within their jurisdiction. If they had, this court would presently have told the king he had no power to assign them to any person but themselves. Some causes, then, were delegated to the president and council: the rest, which were great and weighty, remained before the king and council.

Thus

Thus these two clauses serve to explain each other, the council is understood in its proper sense, not to mean the judges, who, it is plain, had nothing to do in Wales, great or small causes, except as above; but the privy which was the proper judicature for these matters, and retain to this day the traces of such a jurisdiction in Wales, and in the isles of Jersey and Guernsey.—To add a very good political reason, why this reservation of the most urgent and weighty causes to the council was extremely proper, and most necessary at that time. For if you consider, that the acts of union the power of the lords marchers were destroyed, and that these great men, from being in some degree sovereign princes, were reduced all at once to private subjects, there was great reason to apprehend this alteration might be attended with tumults and insurrection; and therefore it was fit, that the king should reserve to himself the hearing and determining of these offences, and not leave them to be determined by the common juries, or the insufficient authority of the lords and council. In reality, no such disturbance followed; therefore, as it seems, the council had no occasion to exercise this extraordinary jurisdiction, but all matters fell by degrees under the government of the lord president and council.

To conclude this matter, the king's council are mentioned in other parts of this act; as when power is reserved to the king's council to alter and confirm such customs and usages as they thought expedient; in which place it is scarce possible that the judges alone were understood by the council. The council is taken notice of in the 27 H. 8. s. 4. where they are described as a body of men, of which the judges make up a part; and that is in the clause before cited relating to Monks, "which directs, that the king's subjects within that county shall be obedient to the lord chancellor of England, the king's justices, and others of the king's most honourable council."

Let any one judge now, whether Mr. Evans had reason to have been silent upon this clause: for admitting the king's council to be the judges, this affirmative authority given to the king's council in urgent and weighty causes, does imply a strong and direct negative, that it shall be exercised in none other but *urgent and weighty causes*; and tho' he should talk till doomsday, he will never be able to persuade a man of common understanding, that an action of trespass for taking and carrying away the value, &c. is one of these *urgent and weighty causes*. Does this clause retorted upon him yield an unanswerable argument against the jurisdiction.

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us stands this case upon those two famous statutes of H. 8. There is yet further evidence behind.—There is the express declaration of the act of parliament, 1 E. 6. c. 10. that the writ neither had nor could run into Wales: nay, not only a prohibition, but an actual provision made, in the enacting part, to remove the inconvenience which was occasioned by this exclusive privilege. For this act, acknowledging the law to be as I have declared, that for the future proclamations upon the exchequer should have currency in Chester and the Welsh counties; and, before, the writ could get no further than the adjoining counties. For this purpose it was necessary to order, and accordingly it is ordered, that, for the future, the sheriffs of all the counties should appoint deputies in each of the king's courts for this purpose; and there is a saving clause to save all other laws in Wales and the said county of Chester.—The 5 Eliz. is a testimony of the same kind; for this act, likewise repeated in the same manner that the queen's writ runs not into the counties palatine, and that a *capias* is not returned thence into the court of king's-bench, provides, that writs of *de excommunicato capiendo* upon a *significavit* out of any county shall go into these counties for the future.—These are full and positive; not mere recitals (tho' even they, of this kind, would have their weight) but full and actual laws, founded upon no other motive, and vain and ineffectual in any other light.

is not all. The first statute, that of the 1 of E. 6. provided only for Wales and Chester; and therefore in the 5 and 6 another statute * was made to take in Lancaster: nay, 31 years after, there was another statute † to take in Durham; and both these make the same declaration. Consider now the force of this evidence.—On the one side, the statute for above forty years together declare and assert, that the king's writ did not run either into Wales or the counties palatine, speak of it as an inconvenience in particular cases, and in general laws to redress the mischief. On the other, from the 1 of H. 8. to this day, except some very modern instances, there is not one single case that affirms it does.

This argument, as strong as it may seem, has one unlucky flaw; and that is, it has been already overruled, by the chief justice and the court of king's-bench in the case of *Wentworth and Maddison* ‡, a county palatine cause. Pasch. 11

* 6 of 5 and 6 E. 6.—EDITOR.

† c. 9.—EDITOR.

‡ This case is fully reported in Andr. 191. and there is a short note of it in 2

—EDITOR.

Geo. 2. The chief justice there takes notice of the argument drawn from these statutes in this manner : " There were *some expressions* in the statute 5 Eliz. and other statutes, says he, " *some expressions* in the statute 5 Eliz. and other statutes, and some time after he goes on thus : " As to the expressions of these acts of parliament, I take their meaning to be, that the king's writs do not run to the sheriffs, they not being the king's officers there."—*Some expressions!* as if they had been by accident. An error of the clerk scarce worth taking notice of. Such slight regard does he pay to those four acts of parliament made with great deliberation ; and all concurring in the same assertion, all concurring in the necessity there was of making such a law to send these writs into Wales and the counties palatine, because the courts had no authority to send them thither without such a law : and yet all the notice taken of them, is by *some expressions*. " They seem to mean," says he, " the king's writs do not run to the sheriffs, *they not being the king's officers there.*" Indeed ! Is not the sheriff in those counties the king's officer ? How comes it then to pass, that he is liable to an attachment for not returning the king's writs, and yet seems to be very hard dealing.—One moment you say, that he is not your officer ; and the very next you lay him by the ears for disobeying the least of your commands.

But let this pass. His lordship admits the writ could not go to the sheriff, *he not being the king's officer there* ; and I agree with him, that most certainly it could not. I know then, who was the king's officer there ? Was the earl, or the chancellor ? Were they bound to execute the king's writs or no ? If they were not, then, for any thing I see, the acts of parliament spoke nothing but the truth. If they were, I am at a loss to find out, for what reason these writs were made, and where was the inconvenience ? What could the statute mean, by saying the writ could not go beyond the adjoining county ; and that many persons had been run out by this means, because they had no notice of the outlawry in these exempt places ? This was, it seems, a mere idle story. Perhaps so. It is possible one act might have been made to correct this mistake. But what shall be said to a second, a third, a fourth, made at considerable distances of time, all declaring the same facts and ordaining the same remedy ? Thus the blunder repeated from time to time for near fifty years, and no lawyer in the kingdom could be found to set the parliament right in a matter of such consequence.—But to examine the exposition a little further. *The king's writ does not run to the sheriffs, they not being the king's officers there.* The force of this observation, if it has any, lies here : the king's writs did not run to the lord of the franchise before ; yet they did not to the

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ch as he was the lord's proper officer, and not the
 and therefore an act of parliament was necessa-
 end the writ immediately to the sheriff.—Observe now,
 Durham case. You expect perhaps, that the 31 Eliz.
 relating to that bishoprick would have ordered the writ
 sheriff.—No.—Quite otherwise :—the act sends it to the
 —This is a blunder of the first magnitude. His lordship
 eye upon the 1 E. 6. which speaks of Wales and Ches-
 that act, reciting that the king's writ in this case did
 to the sheriff, enacts, that for the future it shall go to
 and forgot the case before him, which came out of Dur-
 and depended upon another act, the 31 Eliz. where the
 and provision were different, and not one word was said
 sheriff throughout the whole, Nay, what is worse than all,
 ales and Chester are coupled together in that act, upon
 his observation is founded, his Lordship, fixing his eye
 tively upon Chester, took no notice of Wales, where
 is the king's immediate officers; which had it been
 would have proved this interpretation to be absurd and
 le. But the truth is, his lordship wanted an evasion;
 he was musing attentively upon this palatine case,
 lpt his notice, and so he fell into this exposition, which
 with as many absurdities as can be contained in so few
 e but one thing more to mention, and I have done; and
 that altho' near two hundred years have passed over since
 and 35 of H. 8. was made, yet till very lately, within
 or two, no such action has been ever brought by any
 no such jurisdiction ever claimed by this court. This
 forced by the attorney-general *, as indeed was every ar-
 he used, with great strength of reason. And surely it is
 nge, that such a right of jurisdiction, if such a right
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 on, that what has never been done ought not to be done
 is truly applicable. For considering the infinite number
 s, where convenience would have tempted the suitor or
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 Too that the courts themselves (which have never, that
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 t faulty on the other side, in grasping at more than be-
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Dudley Ryder.—EDITOR.
 Lint, sec. 108.—EDITOR.

right, so that either from records of causes, or rules in this jurisdiction might have been preserved: yet all this withstanding, there is not one case, as I am informed, upon records to vouch the practice (always excepting a few late cases, which go for nothing) nor one *dictum* in their books to establish the right; nay, there are several cases to contradict a matter that depends upon usage, every body knows, that modern precedents are the same as no precedents. Such may be ancient and uninterrupted. By this means old records may be destroyed, and new ones in a course of years established: no such actual usage can be shewn, yet the memory of it may be recorded in books, or by tradition, and that may be that cannot be had, still a right may be preserved or given by positive laws or maxims laid down in old authors. But neither customs nor statute can be produced; if records are silent, and the sayings of lawyers serve rather to deny than to maintain the right; what shall be said to those judges, who tell themselves to be swayed by half a dozen modern precedents *in silentio*, contrary to the practice of all antiquity? I am free to complain of this injustice; because, under this pretence of a few late precedents, the judges have intruded themselves into the palatine counties, and in effect stripped them of their jurisdiction, nay stole it from them, by such a low artifice, which would have disgraced even a pettyfogging attorney. For as they could not, for very shame, deny these counties to be exempt jurisdiction, and so were compelled to admit of it, they have the jurisdiction: yet, by declaring *that* to be the only way of bringing back the cause, and by sending attachments against the sheriff for returning the very truth, that the writ does not lie there; at the same time they admit he is not their officer, and have rendered this exemption vain and ineffectual: I know very well, that, if the officer should be permitted to maintain this action in the bud, their jurisdiction would be put to an end; whereas by putting this task upon the defendant, by laying him too under difficulties, in swearing that he lives in the county palatine, and that he has sufficient goods and chattels whereby he may be attached, they see plainly, that he will think it worth his while to remove the cause at such hazard and expence to himself.

All this iniquity has been established upon the authority of a few modern precedents, as appears in that case of Sumner v. Aston, Hil. 1 G. 1. And in the case of Chapman v. Addison, the chief-justice Lee gave a very broad hint to the judges to furnish them with some ejection precedents; having seized all personal actions in the counties palatine as well local as transitory, he gave a very strong intimati-

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His words are these: "But yet it has been thought in case of ejectment to plead to the jurisdiction, and it is done in the case of lady Falconbridge. Trin. 3 G. 2."

He now gone thro' this case with the best skill I am master of, collecting, from books and records, all the reasons and arguments which I thought pertinent to this matter; I have endeavored to shew, that the whole dominion and principality of Wales from the time of E. 1. and before to this day, as well before the union as since, has always in fact been, and ought still to be accounted out of the jurisdiction of the king's courts of law.

There remain only some few objections, which shall be taken notice of, and receive such answers as they deserve.—These are arguments arising from,

1. Encroachments upon Wales by the court of chancery.

2. Encroachments by the court of exchequer.

3. Encroachments by the king's-bench and common-pleas in sending process of execution into Wales.

4. Encroachments upon the palatine counties by all the courts.

That grand and famous engine of encroachment the *custumal*.

In the first and second, I shall only say, that these courts are ancient, and for a great number of years have been, possessed of jurisdiction.—If you ask how they came by it, and by what right they hold it; I shall answer, that they now hold it by very good title, even by custom and long acquiescence. But as to the third, by which they first seized it, I will confess frankly I know nothing of the matter: but when you shew me the original, by which, under the pretence of equity, the court of law has ingrossed all the business of this kingdom to itself, thereby not only all inferior courts, and entering without *omittas* into all peculiar jurisdictions; nay, usurping the grand usurper itself, the court of king's-bench; I will undertake to shew by what right they sent their process into Wales originally. In the mean time this shall serve for an ancient and a very sufficient one it is for this purpose: that as tyrants do in a course of time by sufferance and consent grow into absolute monarchies; even so the jurisdiction of these courts which had neither law nor usage to support it, when it was first granted, have now by common consent and peaceable possession for many years acquired both; and if this will be any argument of weight with the present king's-bench, it is very certain that their unlawful usurpation now will become a good right to their successors an hundred years hence. I do not blame them for

for the *Latitat*, or the exchequer for the *quo minus*. But say, the first invention of these tricks was neither honest nor justifiable. However, they are established and must be maintained, no matter how they sprung; for to endeavour from time of day to shake powers and jurisdictions, by enquiring minutely into their originals, would breed infinite mischief and confusion. Yet if you consider, by what slow degrees these jurisdictions grew, and that at this time it is hard to say when they commenced; that they crept silently into practice, and were never questioned till after they had got the sanction of the law to support them; you will find those cases very different from the *quo minus* is an ancient prerogative process; and the debtor always was privileged for the sake of the crown there; the crown always was intitled to sue in any of its courts notwithstanding particular exemptions. Who can shew when this writ first issued upon a mere surmise, or upon a man's name who was first arrested by a *Latitat* without having been first in the marshal's custody? If these fictions had their beginnings been opposed and withstood, I cannot see how possible, that the judges would have countenanced so gross a falsehood.—So much for this objection, underneath which is contained as shameful an argument as ever was uttered in the name of justice, and in plain words amounts to no more than, We have as good right to do wrong as other courts have, and will do wrong because they have done it.

The third objection, tho' it furnishes as much matter for complaint as the former, is as easily answered; nay, as it affords a very strong argument for the defendant. The custom of sending executions into Wales was settled in the reign of Whiterong and Blaney, in 2 Mod. 10. and other books say justly, is another question. But in that very case the court were forced to own, that the rule of *breve domini regis non in Wallia*, tho' it did not extend to judicial writs of execution, was yet true with respect to original writs.—But we are told that a *Latitat* is no original writ. I am sick of these objections. The judges there, meant original process in opposition to execution process: and shall this *Latitat*, a fraudulent contrivance to steal jurisdiction, a lye from the beginning to the end, have more privilege than the honest originals of the common law? But be it an original or not, what business has it in the Welsh court, in the last mentioned case, confined their opinion to the execution, and none else were mentioned; and the reasonable reason then given to support that judgment was the necessity of the case, to prevent a failure of justice; a reason, which has nothing to do in the present question, for the defendant is not in Wales, as appears by the plea, and might as well be

as in this general; and there is no other fourth already in difference prison is be let the c in a pal ison. Cor to some p the palatine al or trans is at blished, t on without o all cause ally, we an that let him gorganshire and affirm prison. T beyond the old with a v there will te should, f is, I do not end men th ble. And s and Strin ment as a e judgment polish object mend him; and will y impossible be sent all defendant an e of action a

as in this court. This was excellently urged by the attorney-general; and therefore let the court remember, that in this there is no defect of justice.

the fourth objection, the case of the counties palatine, I already in the course of this paper taken frequent notice of difference between these and Wales, and how unapt the prison is between them. But if they must be compared together, let the court allow the plea; for, that such a plea would hold in a palatine case, the court admitted in Chapman and Wilson. Consider further, that the question here is not confined to some particular branches of jurisdiction, as it has been in the palatine cases; it is not whether this court shall hold plea real or transitory, in real or personal actions; but the whole jurisdiction is at stake: for the rule, upon which this claim is established, that the king's-bench is not to be ousted of jurisdiction without express words, when applied to Wales, will extend to all causes, without leaving one single instance to be ex-

cluded. Now, we are told the defendant is in the marshal's custody; that let him pretend as long as he pleases to be resident in Shropshire, the declaration, which cannot lie, denies the fact, and affirms positively that he is here at London in the marshal's prison. This being so supposed, the defendant of course is beyond the reach of the Welsh jurisdiction; and then you are told with a very grave face, that unless this court keeps the rule, there will be a failure of justice. Now, that a counsel for the plaintiff should, for want of a better, insist on such an argument, is, I do not so much wonder at. But that those grave and learned men the judges should lay any stress upon it, is scarce credible. And yet in Jennings and Hankyn, Carthew 11. and in Stringer, Carth. 354. which were palatine cases, this argument as a make-weight is thrown in, and much relied on for judgment. The attorney-general in the argument called the objection foolish, and gave it no other answer. And truly I commend him; for this pretence cuts up all argument by the roots, and will make all pleas to the jurisdiction in all cases equally impossible to be maintained. By this method the *Latitat* may be sent all over the world; and if you can once lay hold of the defendant and declare against him, no matter where this is the case of action arises, he must answer,

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THE
ABUSES AND REMEDIES
OF
CHANCERY.

BY MR. GEORGE NORBURIE.

AND PRESENTED UNTO THE
LORD KEEPER.

fact is from a manuscript in the British Museum. See MSS. No. 4265. From the contents it appears to have composed in the latter end of the reign of James the first, after the fall of Lord Bacon and the promotion of Bishop Rams to the great seal.]

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THE
ABUSES AND REMEDIES
OF THE
HIGH COURT OF CHANCERY.

TO THE RIGHT HONOURABLE THE LORD KEEPER.

SAY it please your good lordship, now at your first advancement to the high place of Lord Keeper of the Great of England, to accept from the hands of a poore clerke of chancery this simple present, containing none other than a discourse of some few things, which, in the time I have trained up and continued in the said court, I have in the see thereof observed. Which I presume not to offer to lordship, for any confidence I have in the merits of the presented, or of my own skill, being the most insufficient any others; but meerly out of an earnest desire I have to do lordship's service: holding myself in duty bound thereunto only out of the general respect that every inferior memberth unto his head, but out of some nearer relation I have your lordship, by possessing one of those offices whereof lordship hath the patronage and gift, and which, next unto and the King, chiefly dependeth on your lordship's protection.

cannot be unknown unto you, how this favourable court of which is one of the highest courts of the kingdom, and is termed the secret closett of his Majesty's conscience, his oppressed and distressed subjects hope to find mercy mitigation against the rigour and extremitye of his lawes) and many grievous complaints preferred against it in the high

high court of parliament, some of which have approached into the presence of the king; and that many have been work by the parliament-house to discourse and certify what grounds might be of such complaints, to shew they might be dressed, amongst which myself was one so employed. Accordingly I did certify in writing some things, which I thought to be hindrances of the course of justice, and a grievance to the people; and the same my writing was read both in the upper and lower house of parliament. And as then, by commandment, and by virtue of the oath which I was enjoined to take by the said honourable house, I did not only mention some things as they came into memory, which I conceived to be of square, leaving the reformation of them to their good consideration; soe now I do humbly and voluntarily offer unto your lordship's private consideration the best reasons and motives, which my capacity and experience will afford, how a reformation of these abuses may be wrought to them; that, as our good king in this parliament-tyme, taking knowledge how but too many of his graunts were to his loving subjects, had of his blessed disposition annihilated the same, and soe by his royall proclamation † hath, to his eternal honour, given a speedy redress to those evils then could in a long time have been effected in the parliament; soe your lordship, by that which shall be here opened, and with conference of the chief officers of the court, (men of great experience and integrity, to whose judgment and censure I submit all that I shall deliver) may reform the disorders of your own court, and ease that honourable and high house from being any further troubled therewith.

I do remember, that, in the first parliament after the entrance of our king into this his kingdom, nothing was complained of, or more troublesome to the house, than that at that time taken by the masters of the chancery; which the said masters did not exact of the clyents as a duty, but what they freely and voluntarily gave them, yet was it a grievance to the commonwealth not to be endured. And upon, 1 Jac. 1. an act was made, that no man to whom any cause was referred out of any of his Majesty's courts of justice should, under a great penalty, take any thing for his report or certificate, directly or indirectly ‡.

† See 1 Rushw. 36.—EDITOR.

‡ The act meant is the 1 Jam. 1. c. 10.—EDITOR.

parliament have their the cau what was but, the the clie asters (who ient for he receive of taking, ls, who so r. Insom whom bef ion made p for lost, etted anot of the rol more than ment an enacted ects will ing and p whole kir from time t ed governn cerie mar tely publi if well ob court; and take upon of what I avill in th are, which the parliamen chancery, an ms. The pr against lor ed with inq uence was a bog n of chancery ed a privy-se e, and appoint a bill for add sits in it, wa ed, and the p ed.—See Journ these two year

parliament or sithence * no course was to take them away, have their number lessened. They took away the effect, at the cause.

What was the sequel? Verily the parliament was no sooner but, the business of the references continuing as amply, the clients for their dispatch were enforced to give, and masters (whose labours were still used) were adventurers by consent for that which he voluntarily gave them, and by he received benefit: and soe they continued in the same of taking, till Sir Edward Phillips came to be master of rolls, who so handled the matter, that references were *à medio*. Infomuch as I have heard, the lord chancellor himself (whom before that time it was usual to refer causes) upon motion made unto him that a cause might be referred, gave up for lost, saying, references are now taken away; and elected another course in the business. Soe as that worthy of the rolls, by his wisdom and actual performance, did more than the parliament could bring to pass; for let acts, statutes and proclamations, how many and peremptory soe enacted and promulged, unless the cause be taken away, effects will followe, as here before have done, even to the king and parliament, with continual complaints, so as to whole kingdom with combustion. And as in the parliament from time to time many excellent lawes are established for government of the commonwealth, soe also in our court of chancery many good orders have been made; such as are lately published by the lord St. Alban's, which of themselves if well observed, may seem sufficient for the government of the court; and it were too much bouldness and temerity in us to take upon to set down any other or better. But the scope of what I shall now declare is, and of that any other that shall befall in this argument ought to be, to shew, what the state is, which, notwithstanding those good directions, have

the parliament of the 18th of Jam. 1. there was much discussion about the abuses of chancery, and more particularly about the masters, and their fees and expenses. The proceedings on this head in great measure originated from the petitions against lord chancellor Bacon for corrupt practices, which were naturalized with inquiries into the state of the court over which he presided. The consequence was a beginning of various measures, with a view to a reform and new regulation of chancery; and amongst other steps taken for this purpose, the command of a privy-seal obtained by the masters for fees in references to them was revoked, and appointed a committee for drawing a bill to regulate chancery; also a bill for adding two assistant judges to the court, and lessening the expenses in it, was brought in and read for the first time. But here the business of the parliament was afterwards dissolved without any new law on the subject.—See Journ. Comm. for 1620 and 1621; and the Debates of the Commons in these two years, but not published till 1766.—EDITOR,

created such charge and vexation unto the people, and charged against the court, and by what means they may be either abolished, or at the least so qualified, that from henceforth become less nocive and pernicious. Which, not to detain lordship with tedious circumstances over-long, I conceive principally three :

I. STRAINAGE OF AUTHORITY of the court beyond limits in matters of judicature.

II. IMPUNITY OF LITIGIOUS PERSONS.

III. DILATORY PROCEEDINGS.

Quibus si obviam eatur (as I make no question, by Consistence) the court easily may be cleared from the imputation layd upon it, and remain, as indeed in its own proper nature is, a gracious court as any country in the world can be. And soe with your Lordship's honourable favour and permission in all humilitie, I proceed to speak of the things which propounded.

I. AUTHORITIES OF THE CHANCERY.

First, it cannot be denied, but that the boundless power of chancery, in not having rules and grounds written and printed unto it in what cases it shall give relief, and in what the cause of much discontent and distraction to the king's subjects, and clamours against the lord chancellor ; for what is in *scrinio pectoris*, and not in written lawes, whatsoever he determine will by the one side (ever partial in his own cause) thought to proceed out of some humour, favour, spleene, or rupture. And although, in case when the charges shall be trivial (as I doubt not but most of them are) the lord chancellor or judge of the court, being a person of eminent place, may easily vindicate his honor and reputation from being blemished by such unjust proclamations ; or if perchance he should at any time erre in giving an unequal sentence, he cannot want any excuse enough to palliate such his misdoings, by reason that he cannot be charged to have transgressed any written law, order, or instruction, but may answer, that he did according to his conscience, and to the best of his understanding and knowledge ; yet must it needs be a great grieve to a good mynd to see a man seated in such a place, wherein it will be very difficult to find a most sincere and judicious man living so to acquit himself of what occasions will be taken many times, even *à parte et biliter calumniandi*,

and therefore it were to be wished both for the good of the judge, satisfaction of the people, that, seeing the suits in chancery beyond that of former ages are grown so frequent, and so vast as it is, that all men seem now to have confuereunto, on conference with the reverend judges of the some ordinances, rules, and instructions were devised, if possible, both for restraint of the multiplicity of idle ere, as also for the better directions of the lord chancellor, demefne himself in those that shall be depending before seeing the old rule must ever hold true, that the common is best governed where least is left to the direction of the

altho' this be a point too high for a mean clerk to level by God can to shew where relief should be given in the chancery, ere not ; yet I beseech your lordship, with patience, to leave to relate unto you what I have heard concerning from mine elders, men of great experience in the profound of this court, and what I partly know by my own experience which

Matters properly relieveable in the Chancery.

ERY. thing the affirmative part, what matters are relieveable in chancery, I have heard they must be one of these kindes, matters of fraud, trust, extremity, or casualty ; or else to be dealt in here. For almost all others, besides to arise from the remiss, careless, and negligent dealing for whome, who having precipitated themselves into some great misfortunes, come with open mouths into the chancery, for relief ; wherein how far they shall be thought fit to be relieved, I will not presume to determine. Doubtless many wise shall be of opinion it better to smart in some measure for their follies, than at their adversariys, happily honest men then themselves, to vex here with a tedious and expensive suit, the court troubled as it is, and the course of honest careful and pre-empting between man and man should be inverted. For to purpose are bonds made with penalties, leases with forfeitures, and clauses of re-entry, if the wilful violators be exempt from all punishments, and who will take care to pay their debt or rent ? I have heard the late honourable and chancellor lord Ellesmere say, that he would not relieve a forfeited bond, unless it were in case of extremity, or could make it appear that by some accidental means he was occasioned thereunto ; and if he did help any, the party here complain-

complaining should pay all the defendant's charges, both in common lawe and in chancery, (if he were able) if the cause. Whereas of late much lenity has been used to the pursuers, so that many, after four or five years suit and charge in this court, were glad to go away with their principal either costs or damages.

Matters not relieveable in Chancery.

And touching the negative part, wherein the court sheweth no relieve, although the naming of the affirmative excludes almost all others; yet I will give a touch of some of them, by report I have heard are not to be holpen in the chancery, namely,

1 All causes, wherein the common or civil lawe affordeth remedy.

All matters, that are against a ground or maxime of common lawes, or against statute-lawe.

All titles of land, common titles, &c.

Purchasers or heirs against a statute, recognizing judgment acknowledged for valuable consideration; or a woman's dower where she never acknowledged a fine.

A debt without specialty against an executor, unless in very special cases.

Leases and bargain paroll, verball promises, and wills, exceptive.

Promises and protestations to give or grant any thing contrary to a will or deed in writing, or over and above that which is in the said will or deed containyed.

Averments contrary to a deed or article in writing.

Contracts for procuring of honourous marriages, benefices, offices, &c.

Annuities out of lands against a purchaser or heir, where there was noe attournment.

A lord of a manor against his tenant touching customs and fines.

A surety from being lyable to the payment of all the costs and damages, as far as the principal.

Noe man against his own act and deed, promise, or contract, not obtained by fraud, or done in trust.

And many other things, some of which are contained in the last lord chancellor's fifteenth ordinances *.

* Lord Bacon's ordinances in chancery are meant.—EDITOR.

and generally this hath been observed, that all the scandal, hath risen to the courtes and judges thereof, hath been occasioned by granting relief to pleasure friends farther than the court will bear, and thereby also to shew their authority and greatness; which cannot be done but by the disgrace of others and danger to themselves, for *quod caret aliequie durabile non est*. And never or very seldom any scandal hath grown to the one or the other, by denying relief; for who can justly complain, if he be sent to be tried by the laws of the realm, against the extremity whereof if he be relieved, it is upon weighty and important considerations, and not to be extended to every wretched and wilful person. If a wide gate should thereby be opened to all licentious persons?

Instance: but one of the particulars before remembered, is, relieving of sureties and others by bills of conformity (praised be God, condemned by his Majesty's gracious declaration) what prodigious mischiefs have ensued thereupon? the overthrow of all commerce, and bringing in of jesuitical evasion. For a man's bond under hand and seal is his whereby he testifieth before all men himself *firmiter teneri pro toto et in solido*, which belike was with a mental reservation, not to perform it, but to evade it by a suite in chancery; saying, that he is but a surety. True: thou art the butt that is hit at: had it not been for thee, the money had not been lent, and if the other faile, thou must abide the stroke; or Solomon's caveat to take heed of suretiship could undo or save no man, that would but prefer a bill or were able to prosecute in the chancery.

III. IMPUNITIE OF LITIGIOUS PERSONS.

Touching multiplicity of suits, which groweth by being indulgent to litigious persons, that order made by the last chancellor is worthy to be remembered; that such, as have *habilem causam litigandi*, shall pay utmost costs to the party wrongfully molested*, which well observed will cause fewer suits, and consequently less incumbrance to the court. Another way to prevent bad suits will be, to cause every one commencing a suit here to prosecute the same to hearing,

* See N^o. 54. of Lord Bacon's Ordinance.—EDITOR.

and that by such a tyme, at his peril (except in the mean time the parties do agree), or else the cause to be dismissed with costs. This is the course of the common law, whereby the court (which is the first process) directed unto the sheriffs, running upon this condition: *Si (the plaintiff) fecerit te securum de clamore suo prosequendo, tunc summonneas defendentem, quod sit coram iudice nostris apud Westm. tali die, &c.* And there be plegii put upon every declaration; which, tho' they may now be in matters of course, and no such security is given in deed sheweth, that, *à principio*, the common law, which is grounded upon reason, did not think it fit, that any man should be summoned or troubled, unless caution were first given to secure the suite, that so the defendant in them might have recompence, if he were unjustly vexed. And I have heard, that there is a statute * that noe bill should be preferred in chancery upon security first put in to prove the suggestions of the bill, which praieth the lord chancellor to grant him a subpoena against the defendant. Howsoever it were, the rule aforesaid will be as good, by prescribing either a certain tyme for every party to procure a hearing in, or that practice of Sir Edward Coke, who, upon the making of it appear unto him that the party had neglected proceeding but one half term, used to bring the cause quite out of the court * * * * *

Paucity of good Causes.

Moreover it is to be observed, that of ten bills brought into this court, hardly three have any colour or shadow of justice in the plaintiff's complaint. The rest are found *omni fundamento carere*, and are exhibited either of malice, or out of a turbulent humour, and with too many are possessed, or else to shelter themselves from the storm while from some eminent storm. Wherein as many times the remedy proves worse than the disease; so if they were permitted, as aforesaid, to come to the touch (that is, to the trial, where their nakedness will soon appear), and there, if their causes be frivolous, were to be well lashed with costs, to make them, and others from their examples, more wary, they trouble their neighbours and the court so idly as they should.

For what a miserable thing is it, that the plaintiff should be brought the defendant from the farthest part in England to

* The statute pointed at is 15 H. 6. c. 4. In a note upon a preceding page I have had occasion to express a doubt, whether this is really a statute; I serve that whether it is or not, it has been long unattended to in practice before p. 348.—EDITOR.

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bill; which done, he will, perhaps, quarrel at some part
answer, get it referred to a master of the chancery, and
suddenly over-ruled for insufficient; and so having vexed
him to great expences, leave him in the end to wipe his
sleeve for any recompence he shall get, be the cause
ridiculous!

as the plaintiff, if he be found to have commenced a
suit, is thus to be punished; so reason doth require,
where the defendant hath kept the plaintiff from his right,
high hand, either of manifest fraud or violent oppression,
so not to be spared, but severely punished, and chastised
for error of others, by causing him to make restitution to the
the wronges that he hath offered.

Objection.—But some may say unto me, “to give such inti-
on of such strict courses to be held with suitors in chance-
may be of evil consequence, in eclipsing the glory and
negative of the court, and diminishing the profits of the
ers and clerks thereof, yourself being one; and it is an
bird that defileth his own nest.”

Answer.—I answer, —If it were so, that by fomenting and
ing bad causes, some profits might accrue unto the offi-
the court, yet what are we to the whole kingdom?
not our zeal of justice and the love of our dear country to
precious with us than our own private gain? Or shall
degenerate as to think, that this honourable court and
ers thereof cannot subsist and maintain their flourishing
unless they be holpen and supported by the spoyles and
of the people? Farr be it from me so to think. Nay,
the contrary; for when Sir Edward Phillips was master
rolls, no man living, I suppose, could devise more strict
for the scourging of wrangling suitors out of the court,
cute the same with greater dexterity than that worthy
th whom it was familiar to dismiss twenty or thirty causes
day, many of them on their own counsel's motion, and
dismiss them that they never stirred more. And yet, I
undertake, the officers of the court will acknowledge, they
ained so much as they did in his time. And the reason
rendered; for he suffered not his sheep to run astray,
der into the wilderness of endless perplexities; he re-
o causes; nor gave days to shew cause, whereby the
re not *tonsæ* only, but *excoriatæ et fere laniatæ*, before
se come to maturitie: but he hooked them to the fould
court, and there kept them till the day of triall, which
long delayed; whereby it came to pass, that whole

multitudes of suitors flocked into the court, knowing the justice to be had with expedition. Whereas of late years are glad *de sua vice decedere* and to sit down with much and oppression, fearing there by stirring to be no whitt or else, belike, to be smothered amongst the crowds and of so many wrangling companions, and their babbling such as the court at this present hath almost noe other.

III. DILITORY PROCEEDINGS.

The third and the last is DILITORY PROCEEDINGS before I venture to speak of, it behooveth me to shew, proceedings of the court are, and within what tyme a the course of the court may come to a public hearing, and frequently a final determination.

Ordinary Proceedings of the Court.

First, all men know the proceedings of the court to be and familiar.

The plaintiff prefers his bill, and the defendant is to answer within eight days after his appearance; unless upon made of his age or impotency there be obtained a committ take his answer in the country, or he appear and make o he cannot answer without perusal of writings or conf with persons remaining in a remote place, when he hath till the next term following to answer. This once ma returned, the plaintiff may instantly reply thereunto; defendant, being served with process *ad rejuuendum*, ether rejoyne or lose the benefit of rejoining within other days, and then examine witnesses, either by commission court; which being published, the cause is at hearing.

This may be performed in most cases within two terms, and within five at the utmost, be the adverse party so perverse or refractory.

How then cometh it to pass, that this honourable court be traduced as it is, and have so many fowle aspersions upon it, as to be termed a dilatory court, where a suit longer than a suit of *perpetuanda* or a suit of *buße*, into w poor suitors, coming like a flock of sheep to a bush for are there more wett than they were in the open field; and bush will not part without a fleece, and out of which they

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the noate they came in, pittifully complaining; and such vile reproaches?

Motions chief causes of delay.

If your lordship know the reason, and who are causers thereof, answer in a word, Councillors; for well neere with every them nothing is more familiar, than so soon as the bill is cited, presently to ruminare upon something that may be done; and whether it tends *promovere* or not, he is at no loss. He chance to get a new order, then he thinks he hath made great exploit, and bound the poor clyent to him for ever. Next day he is overthrown. Yet will he not so give it over, but will make more work for himself and his adverse pleader, and like a wanton builder, *diruit, ædificat, mutat quadrata*, till his clyent hath scarce a round shilling left in his pocket. For what can a judge grant before proof made, unless it be one of the cases hereafter named? As St. Jerome saith, by argument not drawn from the scripture, *quædam facilitate conceditur qui probatur*; for all that is built upon surmise and alibi is as soon overthrown as graunted.

The pleader will say, he endeavours to give his clyent's short cutt, and to set him speedily on shore from the tempestuous danger and charge. Alas, how oft have we seen twelve orders in a cause, and perhaps half as many reports hearing! Cost they nothing? And afterwards, upon the day of a grave and judicious councillor, all is overturned or set aside as impertinent, and the plaintiff ordered to proceed to proof, and soe to hearing. For accelerating of causes, saving of expences, surely it had been better there to have waited where they last ended, and happily your cause had been heard many years before.

It may be demanded, how the importunity of council and their needless motions can be prevented? I answer, there are but four things, that an advocate can pretend to be done for any motions before hearing.

Grounds of motions examined

Staieing of suits at law upon bonds
Settling of possession.
Stay of committing waste.
Amending the defendant's answer.

All

All other petty motions, as touching discharging or punishment of contempts, granting of *dedimus potestatem*, renewing commissions, &c. if they cannot be reconciled by their attorneys amongst themselves, may be, and are most commonly, resolved by petition preferred to your lordship or to the master of the rolls grounded upon some certificate or affidavit, or by the master rolls himself upon motion made by the attorney or their clerk, or by him referred to such attorneys as are not *towards* the cause without any great charge to the client or trouble of the court.

1. Staieing of suites at law.

True it is, that, before the cause can be brought to trial, the plaintiff may be oftentimes tried at law; or if a verdict or judgment be had against him, it is a great inconvenience. Therefore the court, to prevent the same, useth to grant injunction to stay the suite at law, touching any matter complained of in the bill, till the cause be heard, and the court make further order; and this may be done either before or after answer, as the cause shall require.

Injunctions before answer.

If it be before answer, it must be upon one of these grounds appearing by affidavit, as in the lord of St. Alban's 22d year, viz. that the defendant being personally served with a *subpœna* appeareth not, or having appeared fails, to answer at the time prefixed, and so incurs an attachment for his contempt; or maketh oathe he cannot answer without sight of his books, or conference with persons remaining far off, to the disadvantage of the plaintiff, or absents himself that he cannot be found to be examined at all, and yet by his attorney craftily prosecutes suits at law. In this case, to meet with the defendant's contumacy and delay as aforesaid, the court hath no better way than to grant an injunction at law by injunction till answer made or the court take further order. Yet this is seldom granted, without some taster of the state of the cause; for some causes are so frivolous, that upon the very opening little reason will be found to grant an injunction in favour of them, and the court may be greatly abused, the cause carried away in a clowde of generalities, where the particulars are not instanced.

Injunctions after answer.

And for injunctions after answer, they are used to be granted upon some matter confessed in the answer, or otherwise appearing by direct prooffe or good inducement. And if it is granted of a suit upon a bond, all the principal money, all the

answer to be behind unpaid, is to be brought into the court damages after 20 marks in the hundred, from the tyme in by the condition of the bonds it should have been paid, ther with costs, before the injunction be sealed. And Sir Iord Phillips his course was, that, if the defendant would take the money costs and damages soe brought in, and rest satisfied therewith, then the matter was at an end.

2. Settling of possession,

And touching possession of house and lands, it is a tender and very warily to be dealt in. And I have heard learned men say, that no man ought to be removed from his possession, if a vertue continued in his possession, against a *legal course*, either before or after answer, under pretence of equity, until his right be proved and decreed for him upon the full hearing of the matter in law.

And against a *legal course*; for if a man be forcibly driven from possession without order of law, *pendente lite*, then, if the lordes of the peace adjoining do not presently *ex officio* restore him to the court, upon affidavit of the manner of his expulsion, to restore him to such possession as he had at the time of the disturbance, till he be lawfully evicted.

And for continuing any in possession there is almost as little to be done; for why should any seeke protection here against the lord? If his title be good, he is sure to speede well at lawe; if not, he is caught, it were not equity but iniquity to ayde him, and the titles of lands are not here determinable. To alleadge that he has been in possession these many years, is frivolous. It may be that he holds a lease for years determined, or for lives that are dead, or some verbal promise, which, if made upon good consideration, it is a good plea at law. If it be not some of these things, what hurt can the lawe do him, unless it be in case of extremitye, where a lord of a manor will not admit his copyholder coming in to the manor by descent or by surrender but upon unreasonable fines; or where a tenant for mistaking the day of payment of his rent, or by some casual means, failes to pay at the day, or hath committed some small trespass, which, in strictness of the lawe, tends to the forfeiture of his estate? In this and such like cases, where the plaintiff hath an estate in being (though avoidable in strictness of lawe) God forbid but this court should help him in preserving his possession, seeing he is no where else to be holpen.

And yet in the said cases also the rent arrear and accrewing is to be paid to the lords or owners (if he will accept it) or else to be

be brought into the court, there to remain till hearing, and the tenant to be suffered to keep possession of lands and so to hold his landlord at play with his own money.

3. Stay of Waste.

The third cause of motion before hearing may be to define of waste, committed in felling of timber or fruit trees, pulling down of houses, tearing up of meadows, or the like.

This may be the most safely granted of any thing; for the good of the common wealth, and no way hurtful to man's private, unless it be to restrain a lord or owner from selling such woods or taking such benefit as he hath reserved himself in lease, or which otherwise do properly belong unto him, and whereby the said tenant hath nothing to do.

This suit at law and waste being staid, and possession set by injunction advisedly and not precipitantly and timely granted, with such cautions as in lord St. Alban's orders are set down, which may be done by one only motion, there can be no reason to trouble the court any more in that matter till hearing, especially if a clause be inserted, that the matter shall be heard within such a time as the court shall think fit.

Injunctions
once granted,
not easily to be
dissolved.

Dares to
shew cause.

I am sure the lord Ellesmere (of worthy memory) as he very circumspect in granting these things, so once granted were unrevocable with him till hearing. And if any were so bold as once to overthrow what he had settled (as none that were well acquainted with his grounds would) his answer was "The injunction is sealed, or there is an order already taken." "it, the cause shall be shortly heard; and if then the court shall perceive you have been wronged by that which hath been granted, you shall have full recompence." Much less would he in his manner to give any time to shew cause, in these or almost any case, well knowing, that giving days to shew cause was loading and pestering to the court with business, and an intolerable charge to the client. And it were better for a judge absolutely to deny the motion, which he used to do; and then the pleaders will learn to come instructed with such matters as shall make their motion irresistible, or else keep silence.

I dealt with a client not long since, that had an injunction for possession of his lands. His adversary moved by a great counsellor to dissolve the same. It was granted, unless

shew good cause to the contrary by a day, albeit the
 was grounded only on a mean suggestion, nor verifiable
 by affidavit, certificate, or other evidence in the world.
 at time we had four hundred acres of land sowed by
 with corn upon the ground wett. We attended six days
 least to shew cause, which cost us 10l. at the least. We
 heard at last and shewed cause, which was easy to do,
 to our possession. But was not this a great misery? Had
 been better to have sent him away with his answer, saying,
 injunctions for possessions are not to be dissolved till hearing
 bare surmise"? This had been honourable and just to have
 done, and then had we saved our 10l. and a great deal
 of trouble and distraction, and the other party 5l. at the least
 he spent and got nothing.

4. Amending the defendant's answer.

The last of the causes of motion is, for the over-ruling of
 demurrers, and insufficient answers.

And touching demurrers and pleas, the lord viscount St.
 hath given good directions, as by his ordinances may

be leaveth the consideration of answers to be performed
 by masters by way of reference, which is a very chargeable
 and many ways pernicious to the clyent; for a course
 is taken of late, that if a defendant's answer be reported
 deficient, ask almost what order or injunction you can devise
 to him, it was presently granted. And this causeth many
 to be over-ruled. And to speak truly, what answer can
 be so plain and direct, whereat cavilling spirits will not take
 exception; touching which I have heard the lord Ellesmere
 complain, saying there was no reason defendants should
 stand upon their oathes, the plaintiffs being at liberty. For
 defendant's answer be issuable, why may not the plaintiff
 make proofes, and proceed to hearing without more.
 At which tyme, if any thing shall be found to rest in the
 defendant's breast that hath not been manifested by proofes, the
 court may then examine the defendant in open court, as I have
 heard the honourable lord

often do, where, in the
 presence of the court and presence of so many grave and judicious
 men, more truth hath been discovered by a few questions than in
 answers penned by a judicious lawyer.

And do hear your lordship intendeth to take a most honou-
 rable course about these references:—to cause the plaintiff to
 set forth his exceptions to the answer in writing, together with
 the points of the bill and answers to one of your secretaries, that
 your lordship reading the exceptions and the point of the bill and
 answer

answer ready marked out for you (which was the course Edward Phillips held) you may presently judge, whether answer be sufficient or not; which, altho' it would be true some at the first, yet if you send them away to shew proofes out feeding these cavilling humours, they will soon become cumbersome,

The said sir Edward Phillips used also to judge of answers motions in court; and he took the effect of the bill and upon the credit of the mover (for to read them both were of the court and hindrance of other business) whom if after upon any complaint he found to have misinformed him, he set a fine upon his head, and ever after hould him to be *fidei*, and give little credit to his words, which made counsellors more circumspect in their informations.

Referring
of answers
how need-
ful.

And generally touching answers, it may be truly affirmed that there is not that cause of referring for fuller answers, men pretend, as may be proved by this dilemma. Either plaintiff hath proofes to verifie the suggestions of his bill, or hath noe proofes beside the defendant's confession. If he hath what needeth he then to insist upon the answer? If he wledge he hath none, then if the defendant deny the affirmation the cause is presently to be dismissed, by an order made by lord Ellesmere

And yet if one should move to have a cause dismissed upon point, the plaintiff would take it wonderous unkindly. As we have seen when a plaintiff hath alledged in his bill, that he hath no remedy but the defendant's confession, and that the defendant having been referred to better answer, hath in the end denied the allegations, yet would the plaintiff afterwards run nimble to his proofes, as if he had never so alledged; what he had done at the first, what needed the answer to have been amended? But it was the twenty shillings due to every party upon an insufficient answer, and the defendant's trouble to be sought, and nothing else.

And now they have got a trick, for they will alledge that there is no such precise and direct proof (forsooth) as the common law requireth to prove their assertion, but must partly relye upon the defendant's answer; which is as much as to saie, they have what they have not; so that they will ever keep one trick or device in store, to keep themselves withall, that we shall not be rid of their companys. But let this be observed, that a defendant hath been tortured by multiplicity of answers, which will be found in any of them either of proofe or illustration of the good of the plaintiff; but all his proofs are taken from the depositions, wherein consists the life of his cause, and other serving but as popish confession by racking of men

as, and to entrapp them, and bring them within the compass of perjury or some other damages.

this that hath been spoken, it is evident, that motions are the source and original of references, and of those orders, which the lord chancellor not unaptly tearmed interlocutory, being the hearing, and consequently of all confusion. For it hath been noted, that none will be so ready to move, as he that is in the worst cause; for he hath nothing else to trust to. If he can get his adversary on the hipp by some trick or other in reference, and soe bring him to some hard composition, he will stay with him. If he had not more hope of that than his own, he would never have come unto the court. Whereas he that is in a good cause will never dwell upon these bye passages, but seeks every straw that lyeth in his way a timber logge, to pull him from going on with speede to his hearing, that he may obtain a decree and a good end of his business.

Motions
how
prevented:

I have heard wise men say, that in every action a man under-standeth he should propound unto himself, what the end should be; the end of every man's suit is not obtained but by a judicial hearing. And yet we see how hard a thing it is to keep men from the way that leadeth to this hearing. They will be strag-ling, which argueth plainly they seek no redress of wrongs, but to do wrong.

If the course before mentioned be constantly observed, no decree will be granted, but with a *quomodo constat*, upon sound reasons and plain demonstration of the truth of the information, that is proved, or *cui bono*, how is it material, reasonable, or expedient; how doth it conduce to expedite the cause; what need is there of this motion; what equity; why should it be made? If this appear, then *bene habet*, the motion may be answered with a *fiat*, or else the best answer must be a *nolumus*. Upon it will ensue, that little will be moved, less will be granted, and what is granted will never be overturned. And frequently the vast carriage of motions, references, and orders, which grew to that height by the facilitye and flexible nature of judges that used to grant whatsoever was desired, will easily be spared; and thereby also it will followe, that badd causes will have no great stomake to come thither, and the good will be encouraged.

And

Daies of
hearing.

And thus with much ado, *per tot discrimina rerum*, after many rubs and wrenches, we have brought our cause to hearing, where we hope to have a good end of our business. But the great delays also ever after hearing. Wherefore, before I to speak, I cannot chuse but in a word or two to express the joicing that we all have at the most worthy course which we your lordship hath begun to take concerning daies of hearing, referring them to the by whom they were managed from the first beginning, with this charge, to preferre auntyentest and most important first, and that without any to be demanded or taken therefore.

Difference
of causes.

This is one good step to justice, that a man may come to judgment-seat so freely; and, contrarywise, it was no good that justice would there be rightly administered, where any and pensions were raised out of daies of hearing.

And as touching the causes themselves, great difference is found between those that have been perplexed with a variety of orders and references, and those that have come on smoothly without interruption to hearings. The one will be so much tattered, and abused, that they will be hardly cured; the other without great difficulty will be ended.

Manner of
hearing.

And for the manner of hearing, all men know the same to be plain and easy. Yet divers are the stratagems and devices some pleaders will use, as much as in them lyeth, *imponere*, and to cast a mist before his eyes; namely, a wilful and industrious declaiming, and shunning the state of the question, confident assertion of things no-where to be found, and confident denial and not admitting of those that are plainly confessed and proved in the books, needless digressions, vaine expressions, frivolous amplifications of what they have delivered such like; which, being with great severity at the first repeated, will soon be prevented ever after.

Opening
of the law
to be first
known.

For when the charge of the bill is opened by the plaintiff's counsel, and the answer by the defendant's, though the pleadings be long, yet the question is but short; the true state of the counsel on both sides are to be urged forthwith to the judge upon; which once apprehended and repeated by the judge, the first question that the judge should propound is, to know whether the law holdeth concerning the point, and upon what statute was brought into this court: and if the law be against the plaintiff, (as it must needs be, or else what makes hee here) he shall fear it will fall out, that in many cases little help will be done him in this court; for lawe and conscience are so linked

that they are hardly to be severed, and conscience must al-
 be grounded upon some lawe.
 and if the question be for land of inheritance or goods, (I take
 der reformation) unless fraud or trust be manifestly proved,
 never be holpen in the chancery. In all the cases of conse-
 which are propounded and argued in the Dialogue be-
 the Doctor and the Student, howsoever at the first the
 seemed to reason strongly for equity, (for against the
 ds and maxims of the lawe there is no disputing) there are
 w cases in all his book, where he alloweth any to sue out a
 na, but thinketh it better to suffer an inconvenience than a
 def.

that by examining of judgment of the lawe in every case,
 soon appear whether it be a matter relievable in our court
 —If not, then the judge may discharge himself of it
 by a dismissal; for it is not a tollerable thing, that one
 should encroach upon the jurisdiction of another, whereof
 Majesty in one of his speeches (extant in print) greatly com-
 and misliketh that any court should seek to draw mul-
 titude as it doth. And I have read in histories concerning
 of Venice, that with them it is counted so odious a
 that they esteem it almost as bad as sacrilidge for one
 to intermeddle with another's business. And I marvel,
 any man should think the judges of other courts should ever
 able to cherish or give way unto multiplicity of suits;
 cannot conceive what benefit they reap thereby, besides
 and vexation. And therefore, as I sayed, if it be not
 for the court, a fair riddance will be best.

be peculiar for the court, then the next thing is, that the
 ff's counsel proceed orderly to shew proofes. And therein
 to be enjoined to propound the method which they mean
 to use in hearinge of their proofes, assuming unto themselves
 debate of such things as being proved may make good the
 on of the bill, and to divide the same into several points
 tions; and every point to be handled by itself, and de-
 ns to be read thereupon; and no transition and leaping
 one point to another, before the first be cleared, and the
 have declared, or at least wise treasured up in his own me-
 (till the conclusion) the opinion he hath conceived, whether
 be substantially proved or not. And this is but in some
 te causes. In most there is no such adoe. Which done,
 e like course taken by the defendant's counsel, the knot
 dily be discovered; and then it were better (like Alexander
 reat) to cut it asunder with the sword of justice, than by
 tedious

Benefit of
 expedition.

tedious delaies seeke to extricate the same; for sometymes a dispatch even with death itself is counted a great favour, and intollerable charge of delay is to be considered. *Iniquissima anteponenda justissimo bello.* I could instance some causes were heard and well understood ten years since and more, judge that knew (no man better) how to end them, but did not bear soe to do, for some private respects best known to him, or else hoping that the parties hearing the opinion of the one and the other side seeing his nakedness discovered, which by the soothing of his counsel he could not discern, would of themselves, or by mediation of friends, fall to conclusion. But sure I am the causes yet remaine, as they were not decided; and God knoweth when they will be determined. What hath been expended in the meanwhile by both parties were a shame to be spoken, with one fourth part whereof the obstinate party would at that tyme have gone away well satisfied.

And what hope is there that such as are *partium studium* (most men in their own cases are) will ever of themselves come to some reasonable ends? We see when they are in open contention that the majesty and presence thereof doth sometymes restrain them; and then they will seem tractible, and ready to be moved to any good motion. But no sooner are their backs turned they grow wilder than ever. Therefore there is little hope in this course.

What else may be the cause, that causes upon hearing a cause presently ended? Shall I conceive it to be pusillanimity in the judge, that he feareth or is loath to displease any party? or shall I not think it; for have I not sayd ye are Gods; and shall I stand in fear of men? Verily a clear conscience and cleane heart will be such a bulwark, that the greatest oppositions will be able to shake it.

Hic murus abeneus esto,

Nil conscire sibi, nullâ pallescere culpâ.

Precedents.

Some judges, when they seem doubtful what to determine in a cause, will be inquisitive after precedents; which I cannot conceive to what purpose it should be, unless that being desired to please a friend, and the matter being of that nature that they are ashamed to do it, they would faine know, what any before them have done so ill as they intend to do. But do they think, that if any other have done the like, it is a sufficient warrant for them therefore? Surely no! But the judge, taking upon him that weighty calling, ought to consider his orders *secundum allegata et probata*, and according to the rules of a good conscience, guided by the word of God.

pon certaine knowledge of the lawes of the realm agreeable unto; and soe to divide between lawe and equity, that for particular of any private person no violence be offered to the, and not to be led like a bear by the nose after other men's poles, which, if it were admitted, there is no injustice, how and palpable soever, but might by this means easily be ex-

ne advocate will also be instant, that a cause may be referred to the master of the court, or some gentleman in the coun- which, if it arise from the voluntary motions of both par- and upon their free election of the committees, is the more ble; otherwise it may be dangerous, and it is a kind of per-work condemned by his majesty's late proclamation. we have seen at such tymes letters and messages come from personages; and we have heard other matters have been at, which, how ponderous they may be with mean judges thers not sworne to do justice, is not easy to conjecture. ne answer, which the often-named and never sufficiently sir Edward Phillips was wont to give to their motions is nium, and most worthy to be regarded:—"I sitt not," saith he, "to referr causes; they might have done before they came hither: now they are here, they shall w their doome." And in very deed he would be at such

References
after hear-
ing.

so used to the matter, that he would either by mediation make an end between them with their own (if it were possible) or else returne to his judicial office, like the matter so dead by delivering his resolute opinion, never after revived.

might be sayd concerning the inconveniences which ac- by referring of causes to masters, as also to private parties; th, as somethynge hath been written heretofore upon ano- cation, I forbear now to speak, as also any more at this concerning these matters, fearing I have been too tedious; for which humbly craving pardon, I so conclude this ourse.—The some whereof is briefly no more but this, to the mischiefs that come by straining the court too high, by so favourable to contentions spirritts, by granting too ea- plous motions, and by forbearing too long to give a reso- wer.

Conclu-
sion.

other things there are amiss in the court; as exces- s, and multiplicitie of clerkes, wherewith (for that e presentments and orders concerning the same) I shall at this time to trouble your lordship. It resteth, that by

THE ABUSES AND REMEDIES OF CHANCERY

by adding life (which is execution) thereunto, there may be speedy and godly reformation; which that your lordship, glory of God, and the good of the commonwealth, may the honour to effect, none more heartily desireth than

Your lordship's humble servant,

ever to be commanded,

GEORGE NORBUR

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*See Collett v. Lord Keith 2. East.
+ foreign sentence in index to 2. East*
CONCERNING THE

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OF

SENTENCES of the COURTS ECCLESIASTICAL

IN CASES of MARRIAGE,

WHEN PLEADED OR OFFERED IN EVIDENCE

IN the COURTS TEMPORAL.

*See M.
Cottingham's
case L. 1. Not-
tingham's
837. &
in Bishop's Cas.
Low's Cas. of Cornwall*
The book was written by the editor in April, 1776, previously to a fa-
ctial before the highest judicature of the kingdom, the proceed-
in which are published in the eleventh volume of the State Tri-
the editor having been the junior counsel consulted by the pro-
on that unhappy business. It was originally intended for pri-
se; for the purpose of it was merely to shorten the labours of
ior counsel, who afterwards at the trial so eminently distin-
d themselves as advocates against the accused. But the points
ch the argument applies being of a general nature, the editor
himself, that the information it contains may not be deemed
unacceptable to professional readers. He trusts too, that the
of treating the subject and the time of publication are such, as
re him against all danger of giving offence or pain to any per-
atever; from his anxiety to avoid which he here omits naming
the parties concerned. Indeed if the editor was not most tho-
y convinced of there being no possible ground of reasonable ob-
to now publishing the argument, except its own want of merit,
uld hold himself deserving of censure for thus printing it.—To
planation the editor desires leave to add, that the argument is
with scarce any deviation from its original form, the slight ad-
now made to it being thrown into notes. He is not insensible,
reatly the argument might have been enlarged and improved
e very superior consideration of the subject to be met with in
uments delivered at the trial itself. On the contrary, he feels
ects and inferiority so strongly, that on that account he doubts,
r the comparison may not take from him all apology for ris-
uch a publication. But he doth not mean now to present a new
on the subject, which could not have been executed without
delaying this volume, already too long postponed. He mere-
ds to offer one composed several years ago.]

H h

See in vol. 1. of the same work 1. 2. East. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

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CONCERNING THE
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 In CASES of MARRIAGE,
 WHEN PLEADED OR OFFERED IN EVIDENCE
 in the COURTS TEMPORAL.

*See 4. State Tr. 652. x.
 in Lovell's case.*

...coming to be a single woman libels B. in the consistorial court of
 the bishop of London for jactitation of marriage. B. defends him-
 self by alledging a marriage, and to this allegation A. puts in an
 answer.—Afterwards witnesses are examined and the cause is heard
 before the bishop's official, who pronounces sentence by which he
 declares A. a spinster, and free from all matrimonial contracts
 and espousals as far as to us as yet appears, and more especially
 against B. and concludes with an award of costs against B. in words
 attributing the sentence to be a definitive sentence or final decree.
 Relying on the sentence A. marries C. after whose death A. is
 indicted on the statute of the 1 Jam. I. cap. 11. for felony in mar-
 rying C. her former husband B. being then alive.

In this case, before the indictment came on for trial, it was thought
 to have a full discussion in the form of an opinion of two ques-
 tions of law; namely,

Whether the sentence pronounced in the ecclesiastical court, if
 introduced by the counsel for A. either as a plea or in evi-
 dence upon the trial of the indictment, would be held as
 conclusive in bar to the proceeding on the trial?—And,
 Whether the prosecutor would not be at liberty to enter into evi-
 dence of fraud and collusion in obtaining the sentence?"

These questions the answer given by the Editor was as follows:

ON a very full consideration of this case, I am of opini-
 on, that the sentence of the ecclesiastical court, though
 in a suit of jactitation, will, whilst it remains unrepealed,
 be conclusively in all of our temporal courts, as well when

the suit there is *criminal* as when it is *civil*, unless collusion between the parties in obtaining the sentence is averred. I think, that collusion may be averred and given in evidence to avoid the sentence; and that being proved, it will make the sentence a nullity, and take from the party endeavouring to shelter herself under it every kind of benefit and protection.

I.

THE principle, on which I hold the sentence, if fairly stated, to be conclusive, is this.—I take it to be a general principle of our law, that where any matter belongs to the jurisdiction of one court so peculiarly, that other courts can only take cognizance of the same subject indirectly and incidentally, they are bound by the sentence of the former, and must give credit to it. This rule, which prevails in various instances, is more especially applicable to sentences of the spiritual courts in cases of marriage. Amongst us the law of marriage hath been deemed a subject merely of spiritual cognisance from very ancient times, nor have the temporal courts for many centuries past presumed to examine the legality of marriage, except when the question hath occurred in the trial and as a part of some other more general issue falling within the sphere of temporal jurisdiction. In the *fact* of marriage the temporal courts ought to undertake the trial, and always do, when the *fact only* is in question, as is the case in personal actions. See 1 Lev. 41. 2 Ro. Abr. Vin. Abr. v. 21. p. 43. But if the *lawfulness* is really in question, the temporal court cannot proceed, without calling to the aid the ecclesiastical judge. Therefore when in dower or to impeal the lawfulness of a marriage becomes the issue, it is remitted to the ordinary for trial by certificate. This was formerly the same when bigamy (not the offence formerly called so, but marrying a second wife after the death of the first, or marrying a widow, either of which before the statute of Edward the 6th, c. 12. disqualified from having the benefit of clergy) was denied on its being counterpleaded to clergy; the bishop's certificate still is the proper and only mode of proof in every suit, in which “whether there is a lawful marriage or not” is made the point in issue. See 2 Ro. Abr. 586. On the other hand, if the parties to the suit in the temporal court go to issue on any other matter than the lawfulness of the marriage, as where the general issue is pleaded in ejectment or trespass for trying the title of land, and on the trial the issue a marriage becomes essential to the title of either party, the lawfulness of the marriage is as much the subject of the

incidental fact of a kind merely temporal material to the

But though the temporal court may thus incidentally try lawfulness of marriage, when it is complicated with and comprehended within some other issue; yet, if any sentence of ecclesiastical court is offered in proof or disproof of the marriage, the peculiar jurisdiction of the latter is so attended to by the former, that it will not suffer any point asserted by the sentence to be controverted; a deference, which in my opinion is proper to be shewn by those, who have not the jurisdiction properly or *ex professo*, but only by accident and collaterally, as have. The authorities to this purpose are numerous, so I know of none to the contrary.

In the case of Bunting and Lepingwel Mich. 27 and 28 Eliz. there was an action of trespass for trying the title to a copyhold by the jury by a special verdict found a sentence of a court of law decreeing a marriage on a precontract *per verba de præsentibus* and annulling a former marriage on the same account, and then a marriage solemnized in conformity to this sentence; the plaintiff claiming as heir under this second marriage, the defendant under the issue of the first, the title turned on the effect of the sentence. The court of king's-bench held, though the husband by the first marriage was not a party to it in the spiritual court, yet he was bound by it. The words of Coke in his report of the case are, *that as the consueance of law of marriages belongs to the ecclesiastical court, and the court had given sentence in the case, the judges of our law ought, on the contrary it may be to the reason of our law, to give faith and credit to their proceedings, and to think their proceedings are conformable to the law of holy church; for cuilibet in sua arte perito est verum; and so always have the judges of our law done.* See 4 Rep. a. and S. C. in Mo. 169.—The language of this case shews the great authority of sentences of the spiritual court on marriage as a subject peculiarly within their jurisdiction, but the right of giving evidence for the purpose of reversing the lawfulness of the marriage not appearing to have been the point immediately before the court, the case, it must be observed, is not wholly a precedent of the conclusive quality of an ecclesiastical sentence to the present purpose*.

In

the undeniableness of the position, that the direct jurisdiction over marriage concerning the legality of marriage peculiarly belongs to the ecclesiastical court, and that its sentences on this head are in general conclusive to the courts of law. I was content to begin with the authorities in lord Coke's time—But the extent of this peculiar jurisdiction both as to marriage and subjects subject to it, such as bastardy, and of the effect of the sentences of the ecclesiastical court in such matters, may be traced as a settled point in the oldest books of

In Kenne's case 4 Jam. in the courts of wards, the principal point was on the effect of a sentence against marriage. Kenne died seized of a manor held of the crown by knight service *in capite*; and an office having found Elizabeth an infant ten months old to be his daughter and heir by Florence after Lady Stallenge, the wardship and custody were granted by the court of wards to Sir Nicholas and her; and against them Martha Williams with her husband exhibited a bill in the court of wards, surmising, that Martha was Kenne's daughter and heir by one Elizabeth Stowell, and therefore praying leave to try the office. When this cause came to a hearing, on the part of the plaintiffs there was evidence proving the marriage of Kenne with Elizabeth Stowell many years before his marriage with Florence lady Stallenge, and that Kenne and Elizabeth Stowell were both of the age of consent at the time of their marriage, and on the side of the defendants there was a sentence of the court of audience in a suit between Kenne and Elizabeth

of our law. Thus Glanville, where he treats of an heir suing for land in the spiritual court in that character, tells us, that if it is objected to the heir that he is not born of a lawful marriage, the archbishop or bishop of the place shall answer him, in order that he may take cognizance of the marriage, and certify his proceedings to the King's temporal court; after which Glanville gives the writ for this purpose, and in it the King explains the reason for referring the ordinary to be *quoniam ad curiam meam non spectat agnoscere de bastardia* lib. 7. c. 13. 14. Bracton also in his copious treatise on the action of dower agrees, that if the want of a lawful marriage is excepted to the claim of the secular court cannot proceed, but must write to the bishop. Bract. lib. 2. c. 1. a. But what is most curious in Bracton is the examples he gives of *pleas of the ecclesiastical court in the action of dower on the point of marriage*, and replying to such pleas that the sentence was reversed on appeal. Bract. lib. 2. c. 1. b. The same subject is treated in Fleta and Britton, both shewing how such pleas may be pleaded in the action of dower. Flet. lib. 5. c. 1. Britton, fo. 251. b. The latter of these writers is the most full on this subject, shewing two chapters particularly applying to it; one concerning the *exception of bigamy*, the other on the *exception of plurality of wives*. See Britton. cap. 107. I take this notice of pleading sentences of the spiritual court on the point of marriage to shew, that antiently at least the bishop's certificate was not always necessary to for trial of marriage in dower, but that, if there was a previous sentence of the ecclesiastical judge, the party for whom it operated might avoid a further trial of the same question. However, it is proper to inform the reader, that there is a modern case, in which the court of common pleas has held, that trial of marriage in dower by the bishop's certificate to be unavoidable. In the case before them, the tenant in dower having pleaded, "never married in lawful matrimony," and the demandant having in reply stated a sentence of archers in favour of her marriage, the court adjudged, that the plea was bad, and that to such a plea the demandant was under the necessity of issuing in order to have the marriage sent for trial to the bishop. 2 Will. 4. This decision too was the stronger, because the sentence pleaded in the case was in a cause, which had been removed by appeal from the bishop's court to the superior court of the Archbishop of Canterbury; and consequently the case for trial by certificate was giving to the inferior jurisdiction an opportunity of contradicting the sentence of the superior one, even in a case actually removed from the latter on an appeal from the former.

well, declaring their marriage void on account of the impu-
 of the parties, and therefore divorcing them, and granting
 liberty, *ad alia vota convolanda*. This case, which consisted
 other particulars not material to the effect of sentences of the
 tual court, was referred by the court of wards to seven of
 judges, amongst whom lord Coke was one; and it appears
 ve been argued before them several times. The first and
 ipal point is stated by lord Coke to have been, whether the
 tiffs should be received to aver against the sentence of divorce
 Kenne and Elizabeth Stowell did consent to the marriage,
 ould be concluded by the divorce: and though it was urged,
 he age of consent to marriage was a thing taken notice of
 by the common and statute law, and therefore triable by
 common law, and that sentence *contra matrimonium nunquam*
in rem judicatam, all the judges were of opinion, that the
 nce so long as it remained in force was conclusive.—This
 mination is a very strong precedent against entering into any
 on a question of marriage already determined by the eccle-
 al judge; for there was evidence that the parties were not
 eage of consent; and it seems to have been agreed by the
 s, that the sentence being *contra matrimonium* was not con-
 e on the issue of Kenne by Elizabeth Stowell in the spiritual
 ; and yet the judges held the sentence to be conclusive in
 temporal court. See 7 Co. 41. b. and Cro. Jam. 186.

being thus settled by Kenne's case, that the temporal must
 credit to and were concluded by sentences of the ecclesiastical
 court in case of marriage, it followed of course not to re-
 any evidence in contradiction to such sentences; for to
 purpose should proofs be entered into, if, when given,
 cannot be made use of? Accordingly in Jones and Bow in
 4 W. and M. on a trial at bar in ejectment, the question
 was, whether Sir Robert Car was married to Isabella Jones,
 whose issue the plaintiff claimed, and the defendant offer-
 by way of anticipation of the plaintiff's evidence of the
 age and to prevent his giving any evidence, a sentence of
 arches in a suit of jactitation decreeing that there was no
 age, the whole court upon debate held, that this sentence
 unrepealed was conclusive against all matters precedent,
 that the temporal courts must give credit to it, the subject
 of mere spiritual consufance. See Carth. 225. There are
 al other reported cases, in which sentences of the ecclesiastical
 court on questions of marriage have been received as con-
 e evidence. In Hatfield and Hatfield, which was a cause
 uity, the court of exchequer in Ireland, and afterwards the
 of lords in England on an appeal, held a sentence against a
 marriage

marriage in a cause of jactitation to be conclusive, though trial in the spiritual court was not commenced till after filing bill in the exchequer. See appeals in Dom. Proc. for the 1725. In Clews and Bathurst, which was a nisi prius case, Hardwicke, whilst chief justice of the king's bench, after ing a civilian, received a sentence in a cause of jactitation as conclusive evidence against the plaintiff on an action for seducing wife; though the sentence was not pronounced till after joinder in the action at common law. See 2 Stra. 960. and in Caf. B. R. temp. Hardw. by lord Annally 11. In Da and Villa Real, which was also before lord Hardwicke a nisi prius, he held a sentence against a contract of marriage to be conclusive in an action for damages founded on breach of same contract; and lord Annally, in his report of the case, that this decision was after long and learned arguments between civilians and common lawyers. See 2 Stra. 691⁹⁶¹ and S. Caf. B. R. temp. Hardw. by lord Annally 18. Lastly, in Pr and Phillips, which was before lord chief justice Willes a nisi prius, a sentence, annulling a marriage between Mr. Muilman and Mrs. Constantia Phillips, on a former marriage with Delafield, was received as conclusive in an action of assumpsit against Mrs. Phillips after Delafield's death. See 2 Stra. *in margine*, and Mr. Ford's MS. note*.

* The note of this late eminent barrister, as taken from a valuable collection which it is hoped his worthy son the present Mr. Ford may for the sake of his profession be hereafter induced to publish, is in the words following:

" Assumpsit brought against defendant, who gave in evidence a marriage
" one Mr. Muilman. Plaintiff shewed a sentence in the spiritual court annulling
" that marriage, for that at the time of solemnizing it defendant was married
" one Delafield alias Daval, which the plaintiff's counsel relied upon as conclusive
" evidence of the nullity of such pretended marriage. And so it was agreed, that
" defendant could be admitted to shew great fraud in obtaining the sentence
" so avoid it, as judgments are daily avoided by replications of fraud.—R
" on great debate, that the ecclesiastical law was part of the law of the land
" sentences by their judges were therefore in matters of spiritual jurisdiction
" equal and the same force with judgments in courts of record, or in courts of
" equity. Whatever objections, therefore, would avoid a judgment in a court of
" common law, would be sufficient to overturn a sentence in the spiritual court
" but none others: that fraud was a matter of fact, and if used in obtaining a
" sentence was a deceit on the court and hurtful to strangers, who, as they
" not come in to reverse or set aside the judgment, must of necessity be
" to aver it was fraudulent; and this was the reason why executors might
" such averments. But who ever knew a *defendant* plead, that a judgment obtained
" against him was fraudulent? He must apply to the court; and if both parties
" colluded in the cheat upon the court, it was never known that either of them
" could vacate the judgment. Here defendant was party to the sentence, and
" whether she was imposed upon or she joined in deceiving the court, this was
" the time or place for her to redress herself. She may if she has occasion
" or apply otherwise, to the proper judge. Note, Delafield died about six years
" before action brought.—Prudam & al. v. Con. Phillips alias Muilman
" Delafield coram Willes chief justice, Sittings in Middlesex for C. B. after
" chaelmas Term 1737."

are the reported cases, in which sentences of the spiritual court on the point of marriage have been deemed conclusive to the temporal judges; and it is of importance to observe, that this conclusive quality is attributed, without regarding whether the sentence was in its nature reverfible and avoidable or fift, or distinguishing parties and privies from ftrangers. In the cafe the fentence being *contra matrimonium*, the rule of civil and common law that fuch a fentence *non tranfit rem judicatam*, that is, doth not become a thing *finally adjudged*, was laid upon, and even the judges feem to have conceded that the fentence was reverfible by the iffue againft whom it was given in evidence; but ftill they held it conclusive to the temporal judges. The fentences in moft of the fubfequent cafes were in the nature of a fentence of difpenfation, which clearly are not final, as appears not only from the form of fuch fentences, but from the general doctrine in refpect to fentences *contra matrimonium*; and in fome of the cafes, particularly in Clews and Bathurft, and in Da Cofles and Villa Real, the two cafes before lord Hardwicke, this objection was ftrongly urged, but it was over-ruled. In Bunting and Springwel the court held the fentence to be binding on a ftranger; and in Hatfield and Hatfield it was accordingly received as conclusive evidence againft one who was neither party nor privy; and as in this latter cafe the fentence concluded a ftranger, fo in Clews and Bathurft, and in Prudam and Phillips, ftrangers were allowed to ufe a fentence againft thofe who were parties.—From this general practice of deeming fuch fentences conclusive univerfally and without exception, it feems obvious, that the ground, on which our temporal judges give this credit to the peculiar jurifdiction of the ecclefiaftical courts in cafes of marriage, independently of other confideration; and not the nature of fuch fentences, either on account of the nature of the thing which they are given, or in refpect of any diftinction of the parties againft or for whom they may be offered in the temporal courts.

The idea of the reafon, why the fentences of the fpiritual court in the inftance of marriage are fo operative with the temporal judges, receives great confirmation from the effect of fentences in other cafes of peculiar jurifdiction.

The granting of adminiftration and the probate of wills belong to ecclefiaftical jurifdiction; and there are various authorities to prove, that fentences pronounced in the exercife of this and exclufive jurifdiction are fo binding on the temporal courts as to be conclusive evidence of all points directly deter-

Thus

Thus if a suit is instituted to try who have the right to administration, and one of the parties claims as husband, and the ecclesiastical judge decides that there is no marriage, and then grants the administration to the other claimant, it shall afterwards be allowed to make title in an action at common law of the intestate's goods under the same marriage.—Blackham v. Salk. 290. is strong to the point of administration; for in that case the administration did not conclude, it was only a distinction, which confirms the general doctrine. It was an action of trover before lord chief justice Holt at nisi prius, in which the plaintiff proved that the goods had belonged to one Jane Blackham, came into his possession by having married her days before her death, and had been taken away from him by the defendant; and the latter made out his title by proving that Jane Blackham's administrator; and his counsel insisted that the administration was conclusive evidence against the marriage, it being argued, that the administration could not have been granted to the defendant, if the plaintiff had been husband. The words of lord chief justice Holt, as given in Salkeld, are, *A matter, which hath been directly determined by the sentence of a spiritual court, cannot be gain-said. Their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary, but that is to be intended only in the point directly tried. Otherwise it is, if a collateral matter be collected or inferred from the sentence. As in this case, because the administration is granted to the defendant, that the plaintiff was not the intestate's husband, could not have been taken to be, if the point there tried had been, "married or unmarried" and their sentence had been, "married."* 1 Salk. 290. Here lord chief justice Holt concedes it as undoubted law, that, if on granting the administration the question of marriage had been tried and decided, the sentence would have been conclusive in the temporal court, notwithstanding the different purpose of the suit there; and the principle, on which he founds the conclusive quality of such sentences, appears to have been the peculiar jurisdiction of the spiritual court in matters of administration; for that was the ground of argument taken by the defendant's counsel, and the chief justice speaks generally without confining the conclusion to marriages and privies. The doctrine of lord Holt in Blackham's case is cited in the case of Bouchier and Taylor, which was lately determined in the house of lords; and lord Mansfield repeats lord Holt's words out of Salkeld as the ground of his opinion on the points in this latter case.

* 7 March, 1776.

to the conclusion arising from probates of wills when given in evidence, it was formerly questioned; the origin of the doubt being the rule, that probates and administrations, when made, may be denied. Plowden in Graybrooke and Fox shows the authorities to this purpose very fully; and at the end of the case lord Coke, after going through the points decided, enters into a discussion of the same subject: and both agree that though the granting of probates and administrations is to the ecclesiastical court, yet the trial of them is left to common law; and if they are traversed or denied it must be by jury, and not by certificate of the ordinary, as in cases of excommunication. See Plowden 282, & 9 Co. 30. b. Lord Coke accounts for this, by observing, that excommunication was originally of ecclesiastical consueance, but that probate and administration were not so till late times, and that then only the trial of them and not the trial was given. In another place he gives a different reason; for, in the case of the abbot of Marcella he says, that trial of probate and administration is in the country, and not by the rolls of the bishop, because his court is not a court of record, 9 Co. 31. a. Indeed neither of these reasons conveys much satisfaction to the mind; but whatever the reason may be, or whether any good reason can be given, the law seems clearly to be as lord Coke represents it.

Being thus the established practice not to allow a probate to be conclusive in pleading, hence, as I conceive, grew the doubt, whether a probate was conclusive in evidence.—This became a question in Noel and Wells, which was before the king's bench in 20 Cha. 2d. See 1 Sid. 359. 1 Lev. 235. 2 Keb. 337. In that case an action was brought by one as executor, and the defendant pleaded that plaintiff was not executor. On trial the plaintiff gave the probate of the will in evidence, and the defendant offered to prove that the will was forged; but the chief justice, before whom the cause was tried, refusing to receive this evidence, there was a verdict for the plaintiff, subject to the court's opinion on a case. From Keble, who, though not one of our worst reporters, in this instance gives more of the argument than the other reporters of the same case, it appears, that the ground of the argument for the evidence was, that the probate was not conclusive in pleading, an executorship or testatorship being deniable in pleading notwithstanding *proferat* of the probate, which is always necessary in action by executor; and therefore it was insisted, that the probate ought not to be conclusive in evidence. But this reasoning did not prevail; for the court held, that nothing should be given in evidence to contradict that which was really adjudged or allowed by the spiritual

tual court in a matter thus wholly and peculiarly within its jurisdiction; though any thing to shew that there was no probate, the forgery or revocation of it, or to shew that the probate was granted by one not having jurisdiction, was proper evidence. See 1 Sid. 359. As to the objection of its being allowed to deny the executorship or testament notwithstanding the probate, it was answered by observing, that it proved the right to deny the seal of the ordinary, and that the issue was triable by a jury, and nothing as to the sort of evidence proper to such an issue. See 2 Keb. 337.—But this determination of Noel and Wells did not quite settle the doctrine; for the same case was afterwards made in Phillips and Chichester, Easter 172d. That case was error in the king's bench in England, judgment in an ejectment given by the common pleas in Ireland, and affirmed by the king's bench there. The subject of the cause was a lease for years of which one Edward Chichester died possessed. The lessor of the plaintiff made title to the land under an administration granted by the primate of Ireland in 1677; the defendant under an administration with the lands annexed by the archbishop of Canterbury on account of the testator's being beyond sea, and also under a probate granted to the executor himself by the bishop of Fernes in 1678. The question arose on a bill of exceptions, for not directing the jury to consider the probate as conclusive evidence of the will, in consequence of which the jury found for the plaintiff, though there was no other evidence against the will than the administration granted by the primate of Ireland. In Ireland the king's bench gave judgment for the plaintiff, notwithstanding the bill of exceptions, and it was affirmed in England. See T. Jo. 146. and Raymond. On the first consideration, this case seems to contradict the words of Noel and Wells; but from Sir Thomas Raymond's report it appears, that the king's bench in England allowed the probate to be conclusive evidence, and in their affirmance of judgment proceeded wholly on an idea, that demurrer to the evidence against the probate, and not a bill of exceptions to the judgment in direction to the jury as to its operation, was the proper mode of objecting. Sir Thomas's words are these: *The judgment was affirmed by the whole court, because though the evidence be not conclusive, yet the jury may hazard an attaint if they please; and the proper way for the defendant had been to have demurred upon the plaintiff's evidence. This question, whether the probate is conclusive, hath been variously allowed; but of later days it hath been adjudged that nothing can be given against it, but forgery of it or its being obtained by surprise.* See T. Raym. 405.—But whatever inference this case bears, all the subsequent authorities, I can meet with on the subject

to the relief of the testator. 9 W. 3. and the whole is conclusive of a mandamus to the court, commanding the kin on the return of the mandamus, a will was made by Raymond, of the spiritualty, of wills for the sole evidence of the testator, nisi prius offered to prove the will was evidence by his dying; and the words of Holy and the case which happened to his death. 136.—A became mate 8. whilst T. by one as executor, died, that the will was appointing appointing error; and the having probate the plaintiff good, notwithstanding giving him evidence against it. 81. and the 63. In the to be conclusive for perjury, probate was evidence for forgery

to the resolution in Noel and Wells.—There is a case ch. 9 W. 3. in lord Raymond and 12 Mod. in which lord and the whole court of king's bench expressly avow, that it is conclusive evidence of a will of personal estate. *It was of a mandamus to sir Richard Raines judge of the prerogative court, commanding administration to be granted to the kin on the suggestion of intestacy. On a motion to suspend the mandamus, the court granted it; because it appeared a will was in contest in the prerogative court. According to lord Raymond, the whole court in this case agreed, that *the spiritual court is the only proper judge to determine the validity of wills for things personal, and therefore the probate is conclusive evidence to a jury*; and Holt said, that he remembered a nisi prius in which lord chief justice Kelyng, evidence offered to prove intestacy against a probate, told the jury *probate was evidence uncontroversible; and that afterwards it was proved by his order all the other judges concurred in opinion to the contrary*; and Holt added, that *it had been so held ever since*. The words of Holt as reported in 12 Mod. are in substance the same, and the case he referred to was probably that of Noel and Wells, which happened a short time before lord chief justice Kelyng's death. See King and Raines, 1 L. Raym. 262. and 12 Mod. 136.—Another case, in which the doctrine about probate became material, is an anonymous one of Mich. 5 Ann. B. whilst Trevor was chief justice. In *indebitatus assumpsit* by one as executor, defendant pleaded payment to A. B. as executor under another will with probate; and plaintiff replied, that the probate granted to A. B. was afterwards annulled, and the will in his favour adjudged to be forged, and that appointing plaintiff executor allowed, with a traverse of the validity of appointing A. B. executor. On this replication there was a verdict for the plaintiff; and the court held, 1. that payment to an executor having probate did not bind the rightful executor; and, 2. that the plaintiff's traverse of the will appointing A. B. executor was good, notwithstanding the probate of it. But the chief justice, in giving his opinion on this last point, conceded, that *probate was evidence of so strong a nature that no evidence shall be admitted against it*. See Com. 152.—The two next cases relative to probate are the King and Vincent, Mich. 8 Geo. 1. in 11 Mod. 31. and the King and Rhodes, Trin. 12 Geo. 1. in 11 Mod. 33. In the former case a probate was held at the Old Bailey to be conclusive evidence of a will of personal estate in an action for perjury, notwithstanding proof of the forgery before probate was given in evidence. In the latter case an action for forgery of a will was ready for trial in the king's bench;

bench; but, on a motion for a *habeas corpus ad testificandum*, it appearing, that there had been a sentence for the will in question before commissioners of review, lord Ray declared he would not try the cause till the sentence was reversed. I am aware that the case of the King and Vincent hath been thought a very strange one by persons, to whose judgment I defer in the highest degree; and further, that the present practice in our criminal courts is said to be different; in proof of which is cited the case of one Sterling, who was convicted of forgery, notwithstanding probate, on the testimony of the false testator. But when I consider the series of solemn decisions which Vincent's case was founded on, I own I cannot help doubting of it, and that I am little moved by a deviation from the instance, which, as far as appears to me, was without argument, and perhaps more the consequence of the court's being struck by the grossness of the case, than the result of serious reflection on the nature of a probate, or consideration of the authority by which its operation is sustained. Besides, the great objection to allowing a probate to be conclusive is, where it is granted in common form, and therefore seems to be scarce a judgment for where a probate is founded on a sentence in a suit between adverse parties, I think, that in point of general reasoning there would be no room for complaining of the probate's being conclusive; and if a probate thus granted after litigation ought to be conclusive, the argument in favour of the conclusion of monial sentences will not be weakened. See 1 Ro. Rep. 107. where it is said by Dodridge, that probate in common form is not binding.

To these cases at common law concerning probates has been added the respect shewn by courts of equity to the exercise of spiritual jurisdiction; it being settled that they are equally bound by it with the courts of law, and therefore ought not to contradict in chancery the validity of a will of personalty either before or after probate. I will shortly mention the equity cases to this purpose.—In the attorney-general and Ryder, 12 Oct. 1686, one *Widdowes* brought a bill for a legacy, and the executor set forth a revocation of the will; but the lord chancellor said, *the will is under probate, and I will not try it here; go to the ecclesiastical court to prove it there.* See 2 Cha. Cas. 178. In *Archer* and *Widdowes*, which was heard in June 1686, the lord chancellor refused to examine into a will of personal estate on account of fraud in procuring it, there being a probate, and dismissed the bill without reading any proofs read. See 2 Vern. 8. Soon afterwards the lord chancellor in another case, though he would not give aid to the executor by enforcing the trusts of a term, because the will appeared to have been obtained by restraint and force; yet he at the same time allowed, that, as the will was proved in the

it could not be controverted in chancery. See *Nelson and*
Field, July 1, 1686. 2 Vern. 76. In *Plume and Beale*, Mich.
 lord chancellor Cowper dismissed a bill by an executor to
 relieved against a particular legacy with costs, notwithstanding
 proof of its being a forged interlineation; because the will
 proved in the proper court, and it might have been proved
 a reservation as to the disputed legacy. See 1 P. Williams
 See also *Stephenson v. Gardiner*, 2 P. Williams 286.
 ever, lord Macclesfield in *Bransby and Kerridge* set aside a
 of personalty for fraud, and made the executor a trustee.
 his decree was afterwards reversed by the lords; and so it
 was another of his decrees of a like kind in *Andrews and*
es. For lord Hardwicke in *Barnsley and Powell* says, *it is*
only now settled by the lords in Bransby and Kerridge, that this
cannot set aside a will of personal estate for fraud, nor will I
on what is laid down there, and in Powys and Andrews,
the case of Mr. Hawkins's will; and in *Bennet and Vade*
 Hardwicke speaks of the case of *Powys and Andrews* in like
 See as to *Bransby's case* 1 P. Wms. 548, as to *Powys*
Andrews Vin. Abr. vol. 8. page 548, vol. 11. pages 59 & 66.
ey and Powell, 1 Vez. 287. *Bennet and Vade*, 2 Atk. 324.
 the relief given by lord Hardwicke in *Barnsley and Powell*
 least inconsistent with the conclusive quality of a probate.
 will in that case was both of real and personal estate; and
 the former, it had been found by a jury to be forged, and
 plaintiff's consent to probate had been procured by fraud;
 upon the ground of this fraud, and not upon any supposition
 right to examine the validity of the will in contradiction to
 probate, lord Hardwicke ordered the defendants to consent to
 cation of the probate, and intimated, that if this should
 consented to, he should go further, and make the execu-
 tutees. So too in *Sheffield and the dutchess of Bucking-*
 though lord Hardwicke granted an injunction to restrain
 dutchess from further controverting the will of her husband,
 proceeded in a way which leaves the peculiar jurisdiction of
 ritual courts as to probates unimpeached; for he founded
 injunction on an admission of the will by the dutchess in a
 suit, in which it was decreed to be well proved; and he
 ed, that *in an adversary way the court of chancery or a court*
could not determine on the validity of a probate. See 1 Atk.
 these authorities, in respect to the force of a probate at law
 equity, being considered together, as on the one hand
 disputably shew the sole and peculiar jurisdiction of the ec-
 cal courts in the probate of wills, so on the other hand
 in

in my opinion they as clearly prove, that all acts done in the exercise of this jurisdiction are binding and conclusive on the temporal courts, and ought not to be subject to a re-examination of them. If any thing further was wanting to establish this proposition, some argument might be derived from the history of practice in respect to prohibitions, where wills are of real estate as of personal estate. Formerly, when such a will was committed as to the land, it was usual to grant a prohibition for staying probate both as to the lands and goods; afterwards it was granted only as to the latter; and finally it was refused as to both. 6 Co. 23. 1 Ro. Rep. 31. and 358. Comberb. 170. 2 S. P. 552. The ancient practice was only to prevent a prejudicial trial in the temporal court as to the land: the middle practice was founded on the inconvenience which might ensue if probate should be staid, the executor not being able to sue for debts out: the modern practice arose from its being settled, that probate was not evidence as to the land. But by each it was admitted, that the temporal courts could not examine into the validity of wills, so far as they related to personalty; and the sole jurisdiction over wills of the latter well accounts for the exclusive force of probates, where they are admissible in evidence. See 1 Cha. Caf. 80. 126. 192. the case of a perpetual injunction not to prove a will, it having been found forged.

2. *Causes for depriving clergymen of their benefices* form another branch of merely spiritual jurisdiction, except where parliament give a concurrent one to the temporal courts. It is done in the instance of simony by the 31 of Elizabeth, which makes the living void, and is construed *de facto* a deprivation without sentence, and creates penalties recoverable in the temporal courts. Accordingly in Bird and Smith, the former having been inducted into a living on the deprivation of the latter by the commissioners for simony, but being disturbed by the king's bench proceeding in a writ of restitution awarded by the king's bench on an affidavit of forcible entry, the chancellor, by the advice of Popham and Coke chief justices, and Fleming chief baron, granted an injunction to restrain the proceeding at common law against Bird, till Smith had defeated the deprivation. The principle of this decision was, that the temporal courts cannot examine that which is decided by ecclesiastical judges in a merely spiritual matter. The words of lord Coke in this case are commonly strong and expressive. *The law ecclesiastical, is like to a sweet river running through beautiful meadows; if it goes beyond its bounds and banks, annoys by drowning; therefore ought to be corrected and reduced within them again; if the law ecclesiastical exceeds its power, it should be re-*

prohibition to its antient and true course. But so long as it
 at exceed its proper jurisdiction, its sentences are binding to
 and are not examinable by it. To these words of Coke
 porter adds, that all the judges agreed in the principal case,
 deprivation defeated the incumbency of Smith, and bound so
 that no examination of it can be by our law till the depri-
 of it should be undone by the ecclesiastical law, which could
 except by commission of review. See Bird and Smith, Trin.
 in Mo. 781. This decision proceeded on the same ge-
 principle concerning the credit due to the ecclesiastical
 whilst acting within the sphere of their jurisdiction, as
 en before acted upon in Cawdrey's case, in which his de-
 on by the high commissioners, for an offence against the
 Elizabeth for the uniformity of common prayer, appear-
 a special verdict, was the ground of judgment against
 an action of trespass he brought to try the title to the
 of which he had been parson. See Cawdrey's case, Hill.
 Elizabeth 5 Co. 1. The case of Philips and Crawley, in
 common pleas, whilst Vaughan was chief justice, resembled
 y's; for a sentence of deprivation in the spiritual court
 ony being given in evidence against Phillips in trespass
 on part of his rectory, the sentence was ruled to be con-
 ; and these two cases with that of Bird and Smith are
 nger, because in all three the deprivation was for causes,
 or some purposes were by statute made the subject of tem-
 jurisdiction. See Phillips and Crawley in C. B. Pasch.
 abeth, 1 Freem. 83. The words of lord Hale and judge
 a depri in the King and New-College quite accord with these
 in the nations; for in reasoning against a mandamus to restore
 e form of a college, they observed, that if the spiritual court
 of the a man by sentence in a case where they have jurisdiction,
 ed by of it can never come in question in any temporal court in
 ng's be otherwise, so long as it remains in force; but the temporal
 the ad are bound by it. See the King against New College in
 f baron Trin. 23 Cha. 2. 2 Lev. 14.
 com the deprivation and expulsion of members of colleges, by the
 ivation of their founders, usually fall within the peculiar jurif-
 l courts of the master and fellows in the first instance, and of
 dges in tors by appeal, and sometimes of the latter originally;
 is case is now settled, that their sentences for these purposes are
 astical, usive to all other courts, that the justice of them is not
 meadow able even in the king's bench, though it belongs to that
 y drown controul them when they exceed the bounds of their
 them ag on. On this principle a mandamus to restore the fel-
 uld be college hath been frequently refused: and in Phillips
 y it was finally decided in parliament, that a sentence
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of deprivation by the visitor of a college was conclusive evidence in an ejectment for one of the college estates; and the judgment of the king's bench given by the opinion of three judges against Holt, and founded on the injustice of the sentence, it appeared from the facts of a special verdict, was reversed. Dr. Widrington's case in B. R. East 13 Cha. 2. 1 Lev. 23. Patrick's case in B. R. East. 14 Cha. 2. 1 Lev. 65. King and New College Trin. 23 Cha. 2. 2 Lev. 14. and Phillips and Bury Trin. 6 W. & M. 4 Mod. 106. Skinner 4 L. Raym. 5. Cas. in Parl. 35. and 2 Stillingfleet's Eccles. 411.—This case of Phillips and Bury appears to have been elaborately argued, and the reports of it, particularly the Skinner, and the cases in parliament by Shower, are very important matter on the effect of sentences by courts of peculiar jurisdiction. It should however be observed, that in Phillips and Bury the sentence was finally adjudged to be conclusive, yet many of the facts and circumstances relative to the form and justice of the sentence were allowed to be given in evidence against it, and are stated in the special verdict. But it might be owing to doubts on the effect of the sentence; in the late case of Mr. Crawford, the court of king's bench appeared of refusing such evidence against a sentence of expulsion from a college.*

4. The *condemnation of ships* taken in war usually belong to the admiralty court of the state of which the captor is a subject, and there are several cases in which the sentences of such courts have been received as conclusive to all other courts in the question of property hath afterwards occurred; and in such cases no difference is made, whether the sentence was given by a foreign or our own court of admiralty†.—The earliest case of this kind I meet with is that of Hughes and Cornelius, decided by lord chief justice Holt as one in which he was counsel. The case was a trover for an English ship, which was taken by the French admiralty and sold to plaintiff; and on the trial before lord Holt a special verdict of the admiralty of France was produced, and the court found in favour of the English; but notwithstanding this contradiction of the fact the court held the property bound by it, and the plaintiff recovered. See 2 L. Raym. 893. and S. C. cited by the court in Carth. 32.—The law of *nisi prius* mentions the case of an action on a policy of insurance of a ship with warranty that it was English, in which a sentence of the French admiralty court

* Mr. Crawford's case is now in print, being reported by the name of *Grundon and others*, in a collection with which the public hath been just supplied.

See Mr. H. Cowper's Reports of Cases in the King's Bench 315.

† See in the Preface to this volume some observations concerning the jurisdiction of the judge of the admiralty in prize causes.

Recorded; but some how or other the intent not executed. J. H.

there is the note of a case of a like kind as to a condemnation tea by the commissioners of excise under the 10th Geo. I. c. 10. sect. 16. though the plaintiff was not party to the proceeding before the commissioners. See the law of *nisi prius* c. 1775, page 244, and Mr. Ford's note of *Roberts and Fortune* before Lee chief justice at the Guildhall sittings after Easter term 1742†.

6. The cases of *Lane and Deyberg*, before lord chief justice Treby in Hill. 11 W. 3. cited in the law of *nisi prius*, but fully stated in one of Mr. Ford's manuscripts, and the case of *Moody and Thurston*, 8 Geo. I. before lord chief justice at *nisi prius*, furnish two other instances of the force of the least judicial, when done by persons invested with a

* Mr. Ford's note of this case is as follows:—"In trover for 34lb. of tea appeared in evidence, that plaintiff sent the tea for one Lloyd, with a permit, but the porter in his way called at the house of one Rochcliffe, who being set down his burthen, the defendant, who was an excise officer, forfeited on being brought to Rochcliffe's house for R's. use, without a permit, that place, according to the 10th Geo. I. ch. 10. sect. 16. Upon a plea pleaded, defendant, to shew the property was out of the plaintiff, pro condemnation by the commissioners of excise upon an information against the plaintiff, the defendant, to shew the property was out of the plaintiff, pro cliffe for receiving this tea without a permit, which it was insisted was five evidence of that fact, being a judgment before a proper jurisdiction, the other side it was insisted, that plaintiff was no party to the suit; the cliffe had nothing to do with the tea; and that if she made a feigned default as the cause was made default, yet plaintiff ought not to be affected, but should shew this was such a case as no forfeiture arose.—But per justice, the judgment of forfeiture is a judgment on the thing itself, the tea came to Rochcliffe's house was a matter proper for the consideration of the commissioners; and if Mrs. Roberts, the plaintiff, was willing to have the suit, she might have come in *pro interesse suo*, which not doing her party is bound; and that there is no more in this than the common case, courts of law pay such deference to the judgments of each other in matters in their jurisdiction, that the first determination by a proper authority prevail. So then the tea being forfeited, the property could not be in the plaintiff, who was therefore non suited.—*Roberts against Fortune*, at sittings Easter term at Guildhall, 1742."

† But since the writing of this argument the reports by a late judge, writings the editor has elsewhere had frequent occasion to express, have been published; and in them there is a case, according to a condemnation by the commissioners of excise differs from a judgment of in the exchequer, and is not conclusive in an action of trespass for the tea, but mere evidence to the jury. See *Henshaw v. Plaifance* and others in common pleas, Mich. 18 Geo. 3. 2 Blackst. 1174. This case is a direct case of that of *Roberts v. Fortune* and others, before lord chief justice Lee. the two opinions deserves the preference, the editor will not presume to require. That of the common pleas has the advantage of being a more authority, and also not only being more solemn, but of coming from the law, whereas the other opinion was that of a single judge sitting at *nisi prius*; on the other hand, it is a justice due to this latter authority, to remind the reader that there are two reported cases of the exchequer, whilst lord Hale presided, of which contain very strong grounds of argument in favour of lord chief justice's doctrine, though neither is an absolute decision of the point. See *Henshaw v. Plaifance*. It also seems well worthy of notice, that in the argument of the case of *Roberts v. Fortune*, Mr. justice Blackstone, there is no reference either to the two cases before lord chief justice Lee.

See note
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authority.—In the former case the action was brought for them, in cutting off the plaintiff's arm; and defendant justified by pleading, that it was done in correction, according to martial law, for breach of duty, whilst plaintiff was under defendant's command as his officer, and the regiment was marching against the enemy; to which the plaintiff replied *de injuriâ propria*; and on the trial the sentence of a court martial on a complaint by plaintiff was received as conclusive evidence of the justification. See law of nisi prius ed. 1775, page 1, and Mr. Ford's manuscript.—The latter case arose on an act of parliament for stating army debts, which authorised commissioners to summon officers and agents, and where any money was due from one to another, to give a certificate, on which an action might be brought as on a stated account; and an action being brought on such a certificate, lord chief justice Pratt allowed it to be conclusive, and refused to receive evidence against it. See 1 Stra. 481.—But these two cases, and others of a like kind, which happening at nisi prius might be decided without much consideration, I cite more on account of their conformity to the general principle of the more solemn determinations, than respect of their own intrinsic authority. Besides, in Lane and Berg and in Moody and Thurston, the suits at law being between the same parties as the former proceedings were, they do apply so strongly as most of the instances I have mentioned.

As to Burrows and Jemineau, in 2 Stra. 733, I do not treat it as an authority, because I think the decision turned on a principle foreign to the present purpose. In that case lord chancellor King granted an injunction to stay proceedings in an action against the acceptor of a bill of exchange, who had been already discharged of the acceptance by sentence of a court at Exeter. But this is only an authority to prove the conclusiveness of a sentence by one court of concurrent jurisdiction in a matter relative to the same subject in another court between the same parties.

Nor do I infer much from the cases of Webb and Cook, or Thornton and Pickering, and of Boyle and Boyle. In the latter case a prohibition was granted to stay a suit in the ecclesiastical court for saying that one had a bastard, because the pursuing there for this defamation had been ordered by the judge at their session to keep the bastard, and their sentence was founded on a statute was adjudged to be conclusive to the spiritual court. See Cro. Jam. 535. and 625. In Thornton and Cook a prohibition was granted on the same account. See 3 Kebl.

Kebl. 200. In Boyle and Boyle a prohibition was granted two judges against Powel, to stay a suit against a woman for a violation of marriage, the man suing there having been already convicted of polygamy for marrying the same woman when he had a former wife living. See this last, which was of B. 3 Jam. 2. in Comberb. 72. & 3 Mod. 164. All these cases probably be cited for the lady, should the conclusive operation of the sentence in her favour be denied. But I do not lay much stress on them, because they might perhaps be founded on the right of the temporal court to restrain the spiritual court from contradicting that which hath been already finally decided by temporal judges, under an authority expressly given by act of parliament.

Such are the numerous authorities on which I found my opinion of the conclusive quality of sentences by courts having peculiar jurisdiction; and so convinced have I been from the beginning, as well of the general doctrine's being perfectly settled as of its application to the present case, that I should have deemed it unnecessary to have thus expatiated on the subject, if it had not repeatedly heard both questioned by persons, whose decisions upon most occasions would strongly influence my judgment. Though I cannot yield to them in the present instance. In this manner, in which I have endeavoured to methodize and settle the cases, takes by anticipation all the objections usually made, and, as I cannot help thinking, evinces their insufficiency. However, I will consider them singly.

It is said, that the sentence in the present case being *matrimonium* hath not the effect of a thing finally adjudged according to the language of the civilians and canonists, *transit in rem judicatam*; and that as it would not be conclusive to a spiritual court, therefore it ought not to be so to the temporal one. This objection is founded both on the general rule as to sentences *contra matrimonium*, and the words *so far as appears to us*, which in the sentence in question follow the declaration that the lady was free from matrimonial contracts. I admit the rule to be as stated, not merely because it is found in Oughton's *Ordo*, the book sometimes cited to prove that being a book chiefly of weight as to the form of process in suits; but on the authority of those doctors of the civil and canon law, who have written generally *de sententiis et re judicata*, as Scaccia and Heraldus, especially the former, or have particularly treated of the effect of matrimonial sentences, as Covarruvias, Sanchez, and others without number. Regularly as Gaill writes in a chapter on this subject, *sententia in causâ matrimonii non transit in rem judicatam, sed revocatur quando*

per detectus fuerit. Sed ut hoc exactius declaretur, distinguendum
 utrum sententia lata sit contra matrimonium. Primo casu nun-
 um, ut dictum est, transit in rem judicatam. Secundo casu sub-
 nguendum, utrum sententia lata sit pro matrimonio quod tamen,
 ante aliquo impedimento, ut puta quia in gradu prohibito contrac-
 , subsistere non potest, et tunc similiter non transit in rem judi-
 um. See Gall. Practic. Observat. lib. 1, observ. 112. Ac-
 cording to this passage, which I cite, because it gives the whole
 concisely, and as I believe accurately, though not the reasons
 , sentences for marriage are sometimes final and sometimes
 erwise, but those against matrimony are universally not
 ; which latter part of the rule however must be understood
 to leave a right to re-agitate the question of marriage in a
 suit; for after lapse of the time for appealing, the sentence
 is not reversible; even the sentence against marriage be-
 so far definitive, and that for the lady in the present case be-
 so denominated in the former words of it. But it is a suffi-
 answer to the objection drawn from this rule, that the ca-
 in our books prove it to be merely applicable in the spiritual
 ts. In Kenae's case the sentence was *contra matrimonium*,
 it was argued against on that account; but without success.
 sentences in Jones and Bow, in Hatfield and Hatfield,
 ewes and Bathurst, and in Da Costa and Villa Real, were
contra matrimonium. As to the word *so far as it appears to us*,
 they are not mere forms, at the utmost they import nothing
 than the general doctrine as to sentences against marri-
 and the adjudged cases equally answer the objection as to

another object is, that though the sentence, so long as it re-
 ns in force, may bind the lady and gentleman who were the
 es, *strangers* ought not to be affected.——But the cases
 unting and Lepingwell and of Hatfield and Hatfield are di-
 precedents against this objection; for in both of them the
 ence was used in the temporal court to the prejudice of
 gers. It is also answered by the other cases, in which the
 poral courts have received matrimonial sentences as conclu-
 evidence, without regarding what their effect might be be-
 a court of spiritual jurisdiction, and where they would not
 been conclusive in the latter even as against parties. This
 es it unnecessary to consider here, how far the rule that *res*
alias acta tertiis nec prodest nec nocet applies to matrimonial
 es. Should such a discussion be entered into, it might be
 erial to recollect, that the operation of certificates from the
 ary to the temporal court is conclusive to strangers as well
 aties and privies on the points of marriage and bastardy,
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and was so on the point of *profession* whilst that continued noticed by our law. See Fitzh. Abr. *estoppel*, pl. 282. Bro. *estoppel*, pl. 78, & 179.

It may be also objected, that the *interest of the king* is bound by judgments on sentences in suits between private persons; and therefore that the sentence ought not to be concluded in proceedings to which he is a party, as he is in an indictment and to sustain this objection, it may be observed, that we for the defendant in trespass *vi et armis* will not conclude an indictment for the same trespass, and according to some notions cannot even be given in evidence; though in this last respect the authorities do not agree. See 12 Mod. 339, 340. But this objection, as it seems to me, proceeds from the want of due attention to the principle, on which the effect of matrimonial sentences is founded; they being conclusive to the temporal courts, not in respect of the persons for or against whom they are pronounced, or by or against whom they are pleaded, but wholly on account of the *peculiar jurisdiction* of the spiritual court over the subject of marriage. If this was not the reason, it would not operate against common strangers in the temporal courts, nor could even parties be bound where the sentence is *contra matrimonium* and therefore not final in an ecclesiastical court. However I confess, that the authorities against this objection do not apply so strongly in *letter* as in *principle*: for I do not at present recollect any case, in which a sentence or judgment hath been adjudged to be conclusive in a temporal court in *criminal jurisdiction*, except the case of the King v. Vincent Strange's Reports, 481, in which the probate of a will was allowed to have that effect on an indictment for forgery of a will.

Sometimes I have heard it insisted upon, that sentences of ecclesiastical courts in matrimonial cases are not conclusive to the temporal courts; because in them the suit is *diverso intuitu*. A like sort of argument was lately urged before the lords, on appeal from chancery in the case of Bouchier and Taylor against a sentence of the spiritual court in a cause of administration. In that case Alice Merchant as first cousin, and Doctor Bouchier as first cousin once removed, had been competitors in the prerogative court for administration to Mrs. Millington and her estate; and Alice Merchant dying during the suit, her executors became parties, and a sentence was at last pronounced, deciding that they had failed in proving her next of kin, and the directing administration to be granted to doctor Bouchier. Several years after Taylor, who was Alice Merchant's residuary legatee, and not a party to the suit about administration, brought a bill in chancery against doctor Bouchier for a distribution

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ough he had pleaded the sentence, the present master of is granted an issue to try, whether Alice Merchant was kin, and his order was confirmed by the lord chancellor. Bouchier appealed to the lords; and before them two were made; one being, whether the sentence of the ecclesiastical court was not conclusive; the other, whether the circumstances of the case did not make an issue improper*. hearing the decree was reversed on both grounds, with least opposition by the lord chancellor or any other lord. Mansfield, who was the only speaker on the subject, reasons against the decree, was clear, that the sentence was

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reasons for the appellants in Bouchier and others v. Taylor which, other parts of the case of the appellant, were written by the editor as counsel for Dr. Bouchier, have considerable connection with the subject of argument: and as few persons are possessed of the cases in parliament, it be amiss to insert so much of those reasons as is here applicable. The the reasons, which appears to the editor to be here material, was thus

are two general grounds, on which, as the appellants conceive, the try, whether Alice Merchant was the cousin-german and next of kin to the in-
John Millington, ought to have been refused. One is, that the sentence of ecclesiastical court, by which the letters of administration were granted to appellant Dr. Bouchier, excludes the court of chancery from the power of giving an issue. The other is, that if the court had the power, yet, under particular circumstances of the present case, it ought not to have been given in favour of the respondent. It will be proper to view the case in both lights.

must be conceded, that, so far as regards the granting of administration suits for contesting the right to it, the spiritual courts are possessed of a exclusive jurisdiction. Another thing equally uncontrovertible is, that the courts have also a jurisdiction in respect to the distribution of intestates but this differs from the former; because it is merely concurrent, the of chancery having a jurisdiction over the same subject. From these two flow the objections to the court of chancery's power of interference in present case; for on an investigation into the consequences, which must attend such an interference, it will appear to operate, both as an invasion of spiritual court's sole jurisdiction, and as an undue controul of its concurrent one. the suit in the spiritual court, about the right to administer to Mrs. Ann ton, the question was precisely the same, as that which the respondent wants to litigate in the bill he hath brought in chancery for the benefit of *John*. Had Dr. Bouchier and Alice Merchant claimed the administration of *John* as her relations in equal degree, the ecclesiastical judge would have had a right to prefer Dr. Bouchier, on the supposition that his pedigree was not controverted, or being controverted was well proved, without coming to any decision on the relationship set up by Alice Merchant; and if the court had proceeded on that principle, her claim would have been unimpeachable as open to litigation in a suit for distribution, either in the same court or the court of chancery, as if Dr. Bouchier had never obtained the administration. But the case, which really existed, was quite of a different kind, depending on the pedigree, on which Alice Merchant founded her pretensions, as *John* first cousin to the intestate, whereas Dr. Bouchier only claimed to be her first cousin once removed; and this inequality of claimed relationship rendered it impossible to avoid pronouncing sentence on Alice Merchant's pedigree; be-
" cause,

was conclusive, notwithstanding the difference, in points of fact between the two suits; and that the court of chancery exercising its concurrent jurisdiction as to distribution

" cause, if it was true, it was beyond the ordinary's power to give the administration to Dr. Bouchier. The consequence of this in argument seems to be, that the court of chancery is not to grant the distribution against the jurisdiction of chancery over the cause of distribution in the respondent. The object of the respondent's proceedings in chancery is to have Alice Merchant declared the next of kin to Mrs. Ann Millington's death; but this object cannot be attained without contradicting the decision of the ecclesiastical court, which declared, that Turst and Jobber, the next of kin of Alice Merchant, had failed in proving her the next of kin, and therefore the administration to Dr. Bouchier. Should such a contradiction be established, it would wholly counteract the decision of the spiritual judge, and by depriving them of the distribution, to the benefit of which the respondent's wife would necessarily be intitled. Thus under colour of exercising a jurisdiction in a question of distribution, the court of chancery would indirectly interfere to subvert the foundation of the sentence granting administration, and produce beneficial consequences to the appellants; and therefore would in effect exercise the sole jurisdiction of the spiritual court in point of administration, and if it was to repeal the administration itself†.

" Further, it is proper to consider, that, as in the present case the question is terminated by the sentence in the suit about administration was the same as if the suit had been for distribution, so the effect of it ought to correspond, and be the same in point of conclusion; because the principle, on which a sentence in a suit for distribution operates as a bar to another for the same purpose, is, that the same person shall not try the same question in respect to the same thing in two different suits: and this applies equally to a sentence in a suit for distribution, when the point adjudged is the same, as it would have been in a suit had contested about distribution. Accordingly in the ecclesiastical court this would be the effect of such a sentence granting administration, that it would be pleadable in bar to a suit for distribution; and the effect would be the same in chancery, both on account of the justice and reasonable rule, and for the sake of producing uniformity in the exercise of the concurrent jurisdictions. The sentence, granting administration to Dr. Bouchier, then to be considered as a sentence in a suit for distribution, it is contended, that such a sentence would not be a bar to a second suit for distribution, though instituted in another court; for that would be arguing that a person has a right to resort to two concurrent jurisdictions successively for the same question, and if allowed of, would give occasion to clashing and contradictory determinations; and the court last applied to could not possibly have any effect, without preventing the execution of the sentence of the court applied to; which would be assuming a most unreasonable contrary jurisdiction, the court having equal cognizance of the cause, and in fact would amount to an exercise of appellant jurisdiction.

" At the hearing before the present lord chancellor it was objected, that Alice Merchant being dead at the time of the sentence in the ecclesiastical court, Dr. Bouchier was then become as near of kin as any other person, and therefore it was competent to the spiritual judge to prefer him to the administration, without deciding any thing as to distribution. But this objection is without least foundation: for it was settled soon after the statute of distribution, that the right to administration, which exists at the death of the intestate, is to be given to the representatives of that person, who was then next of kin.

† On a bill for distribution of an intestate's effects before lord Hardwicke, the respondent held himself concluded by a sentence of the ecclesiastical court granting administration, *Thomas v. Ketteridge* 1. Vesf. 333. The editor was not present at this case when he wrote the reasons for Dr. Bouchier's appeal.

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the right to it, as such person if living would himself have†. The sen-
tence granting the administration to Dr. Bouchier is full evidence of the prac-
tice of the ecclesiastical court in this respect; for, as a foundation for giving
the administration, the sentence *previously* declares, that the executors of
Merchant had failed in proving her next of kin; from which it must be
inferred, that, if they had not so failed, the administration would have been
granted to them.

It may also be objected, that the respondent was not a party to the suit in the
ecclesiastical court, and therefore ought not to be bound. But there is an ob-
jection to this. Turst and Jobber, the executors of Alice Merchant, as
well as for the respondent and all others beneficially interested under her will,
were the proper persons to contest with Dr. Bouchier; and the respondent, as
legatee of Alice Merchant, is as much bound by the event of the suit
as the executors, as if he had been a party; unless he can shew, that the
plea pleaded *faintly*, or in any manner carried on the suit *collusively*. Exe-
cutors are ranked by the civilians amongst the *legitimi contradictores*, that is,
those who, having the *primary* and *principal* right, may prosecute or defend
as to conclude others, whose right are of the *secondary* and *dependant*
which is the reason for allowing such third persons to intervene. A writ-
ter of great authority on the civil law, in explaining where *res inter alias acta*
between third persons, says, *suâ naturâ ac propriâ vi nocet vel prodest sententia aliis,*
inter quos lata est, quoties his tractatur cum legitimo contradicторе, à quo ceteri jus
iniquam à fonte derivant ac recognoscunt. (Erich Mauriti Dissertatio de Jure
Contradictoris. Vid. fest. 15.) He next explains the term of *legitimus contradic-*
tellamus, unde præjudicium vel commodum, quod ex tali sententia quoad tertium
dicimus plenius esse, atque rei, etiam quoad hunc, judicæ vim obtinere; neque
illi, qui innitur juri legitimi contradicitoris, eoque ad causam suam uti necesse
est, eandem quæstionem denuo retractare licet. The same author then proceeds to
illustrate the doctrine by examples; and amongst them we find the case of an
heres or *scriptus*, who so far as concerns the personal estate partly answers
the executor amongst us, and legatees; in respect to whom he says, *pariter si*
scriptum

Mansfield, though he asserted the conclusiveness of the sentence granting
administration to Dr. Bouchier, denied this particular position. His lordship
remembered arguing a case before Dr. Lee as judge of the prerogative
court, after great consideration, the latter held the right to administra-
tion to be transmissible as above described, but to be grantable to the next of
kin at the time being. A case to the same effect before the delegates was cited in
the case of lord Mansfield when solicitor-general; and lord Hardwicke allowed the
ecclesiastical court to be so settled as to *administration*, though he
was in a *distribution* in favour of a husband's representatives on the principle of
the *disposition* from him as the person intitled to administration at the time of his
death. Collier v. Elliot, 1 Will. 168. 1 Ves. 15. 3 Atk. 526. These
cases are certainly intitled to a very great respect. But on the other hand
there are instances according to which the *right of administering ought to follow the right to*
the estate. In one case Sir Joseph Jekyll master of the rolls is represented to say,
that the point had been so solemnly determined by the spiritual court. Bacon v.
Mansfield, Vac. 1729. in 21 Vin. Abr. 88. The same doctrine is asserted by
lord Mansfield in 1 P. Wms. 382. and by lord Macclesfield in Cha. Prec. 567. and
in a case in 11 Vin. Abr. 87. pl. 24. The practice also of granting
administration to the residuary legatee, in preference to the next of kin, seems to
be of equal authority on the same side; for it proceeds on the idea, that the
legatee requiring administration to be granted to the next of kin, were
not a view to their benefit, and therefore become inapplicable when
the next of kin cannot in any event be entitled to the surplus of the estate to be ad-
ministered.

See further 2 Str. 1111.

lord Mansfield, I was convinced of the doctrine, particularly in respect to matrimonial sentences, as to wonder at the course given by persons of great respectability to the contrary notion.

scriptum hæredem superaverit is, qui legitimam vindicabat hæreditatem, etiam ac fideicommissaris nocebit sententia, ut demonstrat Papinianus; totum enim legatum dependet ab institutione hæredis, unde vires capit testamentum, quæ, an res vel non, inter scriptum et legitimum hæredem disquiri debet. Cui quidem locus tantum forat, si ex alio capite, quam injusta præteritione vel exheredatione vel parintum, testamenti jus impugnatur; his enim casibus, annullata cætera servantur. If then, as in the case here supposed, sentence against an executor in respect to the constitution of the will itself, on which the whole property of the testator depends, is binding upon the legatees, ought a sentence, which as in the present case, only decides as to a property claimed under Alice Merchant's will, to be so. But it is not to the civil law, or the practice of our ecclesiastical courts, that sentence an executor binds the legatees; for in this instance our temporal courts apply a like rule. Decrees in chancery against executors are conclusive against legatees and all others beneficially interested in the personal estate, though they are not parties to the suit, unless the executors plead faintly or evade judgments against executors in the courts of common law have a like rule, though in them legatees cannot be parties. Nor can the respondent complain of any hardship in applying the rule to his case. He cannot plead ignorance of the pendency of the suit there; for it appears by the second bill, and by the answer to it, that he had correspondence with Dr. Bouchier on the subject soon after the death of the intestate, Mr. Jobber; and the truth is, that he was a most active person in the suit from the beginning, which is proved by several of the witnesses examined at the instance of the respondent. If the respondent had been dissatisfied with the manner in which Turst and Jobber litigated the affair, by the ecclesiastical court he might have intervened by an allegation *pro interesse suo* so have made himself a party to the suit. As to feint pleading or evading, it is not so much as suggested by the respondent, that either was in Alice Merchant's executors in their suit with Dr. Bouchier.

It may also be objected, that Turst and Jobber, against whom the sentence of the ecclesiastical court was pronounced, refused to prosecute and suffered the fifteen days, allowed for that purpose, to elapse without taking any opportunity, and that the respondent not being party to the suit could not be carried on by himself; and therefore that it would be unjust to conclude and bind him by a sentence, from which he was not at all affected. But it should be recollected, that mere hardship will not vitiate the effect of a sentence in the ecclesiastical court; and upon that it is the question, whether the court of chancery hath the power to grant an order to turn. Besides, if there is any hardship in the case, it hath entirely arisen from the respondent's own conduct, and he hath brought it upon himself by his suit in the ecclesiastical court, between Dr. Bouchier and the executors of Alice Merchant, was pending seven or eight years after her death; and during the whole of that time the respondent was at liberty to have made him a party, and if he had done so, he would have had the same right to an appeal as he had been a party from the beginning.

As another objection it may be urged, that lord chancellor North, in his order, on the plea of the appellants to the jurisdiction, having been in by answering, it is now too late to use the sentence of the ecclesiastical court either as excluding the jurisdiction of chancery, or as a bar to the jurisdiction by the respondent. But on attending to the words of lord North, it appears, that so far from deciding upon the effect of the sentence of the ecclesiastical court, he only ordered that it should stand as an answer to the plea, for the respondent to except to it, and expressly reserved the benefit of

seems irreconcilable with all the precedents. Not only cases of marriage, but those of probate and administration of deprivation, the admiralty and revenue cases, and all those of sentences by courts martial; in fewer, the whole series of authorities relative to the operation of sentences and judgments by courts of peculiar jurisdiction is ant to this idea; for in all the sentences I refer to, the which the judgments and sentences were pleaded or offered in evidence, particularly in the matrimonial cases, were *ably diverso intuitu*. Lord Hardwicke, when in Mendez v. La Real this was pressed as an objection to receiving a sentence against marriage as conclusive, treated it much in the same way, his answer being, that *the end and intention can seldom be in the ecclesiastical and temporal courts, the one being for the one and the other for a temporal consideration*. See Rep. temp. Hardw. by lord Annally 19.

Another argument against the conclusive quality of the sentence in this case may be framed in this manner. It may be said that the act of the first of James the first, on which the sentence is founded, having given to the temporal courts the trial of the cause, they ought, so far as regards that offence, to be considered as having a *concurrent* jurisdiction over questions of marriage with that spiritual court; and that if they are considered as having such a jurisdiction, the inference from the determined cases, which chiefly rests on the supposition of a peculiar jurisdiction, wholly fails, and then it will only remain to shew, that the sentence does not conclude a spiritual court of concurrent jurisdiction.—It appears to me the most plausible objection which can be made against the sentence; and if the temporal court should be considered to be on the same footing with a spiritual court of concurrent jurisdiction, it would give great advantage to the temporal court, as my opinion is on the effect of the sentence considered as the sentence of a *peculiar* jurisdiction, I have my doubts as to its effects on a *concurrent* one. But I must add, that I do not myself consider the act of James as giving to the temporal court an equal and concurrent jurisdiction over the trial of marriage. On the contrary, my opinion is, that the sentence was meant to leave the peculiar jurisdiction of the spiritual courts undiminished, and only to authorize the temporal courts

By this manner of proceeding his lordship, though he held the sentence insufficient to preclude the respondent from the benefit of an answer, reserved the final consideration of the sentence to the hearing of the cause, and thereby left the appellants at liberty to avail themselves of it in every other respect by avoiding to answer."

The remainder of the argument in the printed case of the appellants being foreign to the subject of this argument, is therefore not fit to be introduced here.

courts to enquire into the legality of marriage as an incident to the trial of polygamy, in the same way as they before enquired it incidentally in civil actions, and that they should show the same deference to sentences of courts having the direct jurisdiction. The exception in the act of James, which provides that the act shall not extend to any person divorced at the time of his second marriage by any sentence of an ecclesiastical court, and any person whose former marriage should be declared void by sentence of such a court, strongly countenances this idea. 1 Jam. 1. c. 11. s. 3. However, should it be thought proper to controvert the point of conclusion, the operation of the act in creating a temporal jurisdiction for the trial of polygamy, seems to me to leave greater scope for argument against the quality of the sentence, than any other topick I am aware of. more especially as the statute of James excepts sentences of a spiritual court in words not sufficiently large in letter to comprehend a sentence in a suit of *jaçtitation*; the statute mentions only sentences of divorce, and sentences declaring a former marriage void.

The only other objection, which occurs to me, against the operation of the sentence as conclusive, arises from some cases, which I observe to have been heretofore cited for the purpose; though I do not see that they in any degree apply to the case of Hinks and Harris, in which a prohibition was granted in the ecclesiastical court against one for incest in marrying his first wife's sister, was granted *quoad* annulling the marriage, because the second wife was dead, and there was issue of the marriage, and consequently bastardising the issue would have been contradicting a rule of our law, that a marriage once solemnized shall not be avoided after the death of either party. See 271. But this case only proves a right to controul the operation of the courts, where they proceed in opposition to the common law, at a point in which it predominates over the law ecclesiastical. Another case is Hiliard and Phaly, in which the chief justice of the king's bench on an issue from chancery that a marriage refused even to receive as evidence a confession against the supposed husband for fornication with the wife, and his payment of money in commutation for a pardon was enjoined. But this case is a single one against other authorities, and is unsupported by any reasoning; the rejection of the evidence was greatly disapproved of by the chancellor King, when the matter came before him. though it is not mentioned whether he granted a new trial. See 8 Mod. 180.—As to Emmerton and Hide, which was before lord Holt, and is cited in Comberb. 72. and Skinner but most fully in 3 Mod. 164. it only proves, that in a

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the temporal court may incidentally try the lawfulness of the sentence, which is not denied.—The case of *Pride and the Earl* in 3 Lev. 410. is liable to the same observation.

II.

Having any thing further to offer in respect to the consideration of the sentence in the case in question, on the point that it was pronounced in a suit really adverse, I shall explain, why I think, that conclusion, if there was any, is not from the sentence its whole effect, and leave the lady protected from inquiry into the alledged marriage with her first husband, as if there had not been any sentence. This point will not require a long discussion; both the principle and the authorities on which it depends, being reducible to a very narrow compass.

It must agree, that the law ought to discountenance fraud of every kind, and so far as it is practicable to disapprove those who practise them, of the proposed fruits. But the law of fraud, by which the courts of justice themselves are the instruments of injustice or of the evasion of law, must be more particularly guarded against; because under the sanction of such a sanction, the deception is more likely to be the credit of a fair transaction, and consequently more likely to produce pernicious effects; and should it ever become necessary to allow the averment of fraud and collusion in procuring a judgment or sentence by imposition on a court of justice, or in any other court than that in which the sentence or judgment was pronounced, it would be an engagement to adopt the law of frauds, which, by rendering detection inaccessible, or except in one particular court could not fail either of defeating its full effect, or of answering a present purpose.

Regarding the authorities on this point of collusion, I shall begin with those which explain the practice of our temporal law, and I shall next proceed to take some notice of the doctrine of the civil law and the practice of the courts of ecclesiastical jurisdiction.

Coke in *Fermor's case*, which depended on the effect of a judgment fraudulently levied by a tenant for years, gives this general rule. *The common law*, he says, *so abhors fraud and covin, that it will not give effect to any judgment, though of themselves just, yet being mixed with fraud and deceit, are in judgment void and unlawful.* See 3 Co. 78. a. This principle may

may be illustrated by a variety of examples, many of which are mentioned by lord Coke.

In general, the sale of goods in market, or by a tortious sale, will be good against the true owner ; but his right will not be affected if there is covin between the vender and the vendee. *Bro. Collusion* 4. 2 Inst. 713. Cro. Eliz. 86.—If an estate is conveyed to the king, and he by letters patent grants it to another, and there is a covin between the person granting to the king and the king's grantee to avoid the statute of mortmain, the grant from the king is liable to be repealed. 3 Co. 78. b.—An assignment of dower by a disseisor to a woman having good title to the land, if it is done without covin between them is good, and will bind the disseesee. But if the disseisor comes to the estate by collusion between him and the widow, the assignment may be avoided by the disseesee, though there is a just title to dower, and the assignment be indifferently made of an equal third part ; lord Coke expresses it, *the covin in this case shall suffice to void the assignment that appertained to her, and so the wrongful manner shall prevail over the matter that is lawful.* See Co. Litt. 35. a. 358. b.—If a husband discontinues his wife's estate in land, and the disseisor disseises, and the disseisor makes a lease to the husband for life, this will be a remitter to the wife, unless the disseisin was by their consent and covin ; but if it was, then the wife is barred. This case of covin's preventing a remitter is cited by Littleton ; and lord Coke in his comment adds another case, in which the issue intail by covin may lose the benefit of an entail. Litt. sect. 678. and Co. Lit. 357. a. b.

But these instances of covin and collusion, not being of a judicial kind, do not come up to the present purpose. The instances which I shall now give, will all have relation to the effect of collusion on judgments.—If a woman, having title to dower, is induced by covin or collusion between her and a stranger, to procure the disseisor to disseise the terre-tenant, to the intent that she may bring an action against the disseisor, and she afterwards recovers according to judgment, the judgment is void and of no force against the disseesee, notwithstanding the justness of her title to dower ; because it was obtained by collusion ; and lord Coke, after putting this case of dower, extends the doctrine to collusive recoveries in other real actions, as well as in dower ; and it is a common language in our law books, that all, who recover land by covin, shall be in as bad a situation as if they had recovered by trespass or trespassors according to the nature of the actions in which they recovered. See *Fermor's case* 3 Co. 78. a. *Wimbish and*

Plowd. 4. 2 Inst. 713. Cro. Eliz. 86.—If an estate is conveyed to the king, and he by letters patent grants it to another, and there is a covin between the person granting to the king and the king's grantee to avoid the statute of mortmain, the grant from the king is liable to be repealed. 3 Co. 78. b.—An assignment of dower by a disseisor to a woman having good title to the land, if it is done without covin between them is good, and will bind the disseesee. But if the disseisor comes to the estate by collusion between him and the widow, the assignment may be avoided by the disseesee, though there is a just title to dower, and the assignment be indifferently made of an equal third part ; lord Coke expresses it, *the covin in this case shall suffice to void the assignment that appertained to her, and so the wrongful manner shall prevail over the matter that is lawful.* See Co. Litt. 35. a. 358. b.—If a husband discontinues his wife's estate in land, and the disseisor disseises, and the disseisor makes a lease to the husband for life, this will be a remitter to the wife, unless the disseisin was by their consent and covin ; but if it was, then the wife is barred. This case of covin's preventing a remitter is cited by Littleton ; and lord Coke in his comment adds another case, in which the issue intail by covin may lose the benefit of an entail. Litt. sect. 678. and Co. Lit. 357. a. b.

IN CASES OF MARRIAGE.

Plowd. 42. and Brook and Fitzherbert, tit. *collusion*.—In
 or's case, which was before all the judges, the point de-
 cided by them was, that if tenant for years or by copy of
 roll makes a feoffment, and levies a fine with proclamati-
 on to the feoffee, and this is done by collusion in order to de-
 fraud the lord of his inheritance, the fine is absolutely void, and
 the lord's right remains unbarred notwithstanding lapse of the
 years. The collusion in Fermor's case appeared from the
 defendant's continuing in possession and paying rent after the fine,
 and the expiration of the lease for years, when he claimed the in-
 heritance, and set up the fine and the five years as a title.—In
 a common place book in the Inner Temple, I meet with
 the following case of a judgment by one court adjudged to be
 void in another court on account of collusion. Edward Barber
 and William Pullen were indicted at the sessions for Wiltshire,
 for Charles the first, before Lord Chief Justice Hyde, Sir
 John Digby, Sir Lawrence Hyde, and other justices, for tres-
 passing in taking the cattle of one Turner. On the trial it appear-
 ed that they had taken the cattle under a *levari facias* on a
 writ returned in the county court in an action of debt by Barber
 against Turner; but it being proved, that the action was a
 collusion between Barber and Pullen, and that Pullen had ap-
 peared for Turner without any authority, the court was of opi-
 nion that the judgment was a nullity; and the jury finding
 the defendants guilty of the trespass, they were fined 40*l.* a-piece and im-
 prisoned for a month. This case is not in any printed book.—
 A case in Kel. 43. and 1 Sid. 234. is a case in some respect
 similar to that of Barber and Pullen; for Farr was found guilty
 of larceny, though he entered under a writ of possession on a
 writ against the casual ejector by default in an ejectment;
 it being proved, that he had obtained it by falsely swearing to
 have given notice to the tenant in possession, and that
 he had entered he robbed the house of jewels and other
 property. It is well observed by Lord Chief Justice
 Hyde, that Farr's making use of the law to get the possession
 was far from excusing him, that it heightened his offence.—
 The most frequent instances of the inefficacy of collusive
 judgments relate to executors and administrators. Even in the
 case of Lord Coke it was a thing of course to reply to a judg-
 ment up by an executor, that it was obtained by fraud or
 collusion. In Turner's case, 8 Co. 132. which was debt against
 an administrator, the defendant pleaded several judgments;
 to one, plaintiff replied, that it was by fraud and covin,
 and issue was joined; and as to the others he replied, that
 he was satisfied and kept on foot to defraud; to which
 the court said, I.

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defendant demurred. Now, in this case there was not a nullity of the nullity of a collusive judgment; but the question of law which arose was, whether a judgment, allowed to be originally good, could become covinous by a subsequent act of the court adjudged that it might. Besides Turner's case, printed reports contain many instances of replications of fraud and covin to judgments pleaded by executors and administrators. In the case of Veale and Gatesden, W. Jo. 91. the judges do not observe, that such replications may be made; nor do they find the right to reply once controverted in any book; the question debated having ever been merely as to the manner of replying *per fraudem* to judgments, particularly whether several judgments should be distinctly replied to or might be taken together or as to the manner of traversing a replication, that a judgment was fraudulently kept on foot, that is, whether the satisfaction or the fraud should be traversed. See W. Latch. 111. 1 Sand. 336. 2 Saund. 48. Cart. 221. 1 Mod. 2 Mod. 36. 1 Show. 289. 1 Freem. 28. See also Merielham's case, 9 Co. 108. in which one point was, whether in giving that a satisfied recognisance was kept on foot by covin and fraud, only one person being mentioned, and covin in itself importing fraud by two at least.

When I consider these authorities, they appear to me sufficient, as not to leave a doubt as to the right to plead or enter the proof of collusion in obtaining the sentence in question as to the effect of the collusion when proved. All the cases I have selected are unconnected with any act of parliament. I have avoided mentioning instances, in which the right of voiding a judgment for collusion in any degree depends on the fact from them. It should also be attended to, that none of the cases and authorities in the least hint at any distinction as to the court of which the judgment is pronounced, or the court in which the fraud or collusion is averred; the rule appearing to be general, and to apply to all judicial acts whatever, and to be all equally void when infected with collusion. Nor can I conceive any reason for making a difference in this respect between the judgments of the temporal courts and the sentences of ecclesiastical. Lord Coke in Fermor's case before-mentioned, after citing an abundance of instances to prove the opinion that all judicial as well as other acts when mixed with fraud or covin are nullities, represents the judges as summing up their sentiments in these forcible words. *Hereupon, as he writes, he concluded, that if recovery in dower or other real action, if*

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a feme covert or an infant, if warranty, if sale in market, if letters patent of the king, if presentation and administration, that is to say, if all acts temporal and spiritual shall be avoided, for the same reason a fine in the principal case, levied and covin, shall not bind. See 3 Co. 78. b. So here I think the judgments of all our temporal courts, even the king's Bench, of record in Westminster-Hall, are universally liable to the taint of fraud and collusion; and, if, being infected with either, such judgments are nullities; why should not the proceedings of courts ecclesiastical be equally open to the same attack; and why, if proved, should not the effect and consequence be the same? The words I have cited from Lord Coke are reported as the opinion of the judges in the Exchequer chamber, and therefore on their authority, as well as on the reason of the thing, I am intitled to think, that in this respect no distinction ought to be made between the two jurisdictions; and that all judicial acts, whether temporal or ecclesiastical, if procured by fraud or collusion, ought to be void *.

It is not requisite wholly to rest this doctrine of collusion on general reasoning or the rules and practice of our temporal courts; for authorities from the writings of the civilians and canonists are not wanting.

Bartholomæus, one of the few who have published separate treatises on the effect of sentences, is very explicit on the subject of collusion. In his famous book *de sententiâ et re judicatâ*, which was printed at Venice in 1629, after stating the general rule, that *pro aliis acta aliis nec prodest nec nocet*, proceeds to explain the exceptions to this rule. One of them, he writes, is, *quando est lata cum legitimo contractore, id est, cum eo cujus principalis interest, et à quo alii jus habent consecutivum; quia tunc sententia facit jus quoad omnes, etiam non intervenientes et non contrarios*. See page 349. The author having enlarged upon this exception, and pointed out who ought to be deemed *legitimi contractores*, and particularly how far the exception applies to sentences pronounced for or against marriage, proceeds next in the formal manner of the law-writers of that age, to qualify the exception by several limitations; and amongst these we find collusion; for he says,

Accordingly the case of Roach and Garvan, 1 Ves. 157. where Lord Hardwicke says, that collusion will overturn any ecclesiastical sentence. See Ves. 287.

that the exception will not hold, *quando sententia efficitur collusionem; quia tunc aliis non noceret*. He adds, *et dicitur præsumitur lata per collusionem, quando victus non adhibuit diligentiam, sed detegitur ejus culpa et negligentia; puta quod non appellat a sententiâ, sed illæ acquiescit, et multo magis confessionem: fraus enim et dolus nemini patrocinari debent rarius præjudicium; et ideo sententia lata per collusionem habet non sententiâ, seu aliis non nocet, quamvis sublata collusione*. See page 355. To warrant this doctrine of the nullity of collusive sentence, the author cites a great variety of writers on the canon as the civil law.

Heraldus, another professed writer on the force of sentence, holds the same language in respect to collusion; though his words are not quite so full and strong as those of Scaccia. shewing that in general a sentence against a *hæres scriptus* being of the number of the *legitimi contradictores*, would be null. Heraldus qualifies the generality of the rule, saying, that the legatary will not be affected, if the *hæres* either is inactive or acts collusively. The words of Heraldus are, *Sanè si contra hæredem scriptum non agentem vel luserint pronuntiatum sit, nihil hoc nocet legatariis, ut ait Ulpianus 50. f. 1. de leg. 1. quod est certi et indubitati juris*. Heraldus. *de rerum judicatarum auctoritate lib. 1. cap. 2. sect. 1.*

As to the opinions and practice of our ecclesiastical courts on the subject of collusion in obtaining sentences, the want of published reports of their doctrine renders it difficult to collect precedents. But there is a case in one of our own books of reports, which seems to prove, that the practice of the ecclesiastical is the same as that of the temporal courts. This is in Moore; and being short, I will give it translated in my own words, which are in Law-French.

Lloyd and Maddox, Easter 14 Jam. in the king's Bench. — One sues an executor in the court christian for a debt who pleads a recovery in debt against him at common law, and that ultra that which would be necessary to satisfy the debt he had not assets; to which the plaintiff in the ecclesiastical court pleads, that the recovery was by covin, and that the plaintiff offers to discharge the judgment and the defendant's costs. And on this the question was, if prohibition was a

; and resolved, that it was not, but that the covin was aptly
 able in the court christian; because the legatee could not sue at
 law for the legacy. See Moore 917.

This case is remarkable, for it appears to prove the practice of
 jurisdictions at the same time.—The ecclesiastical court re-
 the allegation of covin against the judgment as a proper
 of inquiry; and consequently as one which was relevant,
 proved would make the judgment a nullity. The party,
 pleaded the judgment, was dissatisfied; and to avoid inquiry
 the covin flies to the temporal court for a prohibition. But
 temporal court, adverting to its own rule of treating collusive
 judgments as nullities, approves of the proceedings of the eccle-
 siastical jurisdiction; and though fraud and collusion are not in-
 examinable before the latter, permits this species of fraud
 so, as an essential incident to an effectual exercise of the
 jurisdiction over legacies.

On the whole, when I take into consideration all the nume-
 precedents furnished by our own law-books; when I add to
 the opinions of the writers on the canon and the civil law;
 further, when I reflect on the reasonableness of allowing
 on to be averred against a judgment or sentence, whatever
 jurisdiction in which it was given or is pleaded, and on the
 effects which might follow, if any judgment or sentence should
 be open to such an averment; my opinion is so decided, that
 I doubt, whether the counsel for the lady will oppose the
 averment on this ground. I rather suspect, that the contest
 will be, what is the kind of evidence proper to the proof of col-
 lusion, and that what the counsel for the prosecutor may deem
 proper, and that the counsel for the party prosecuted will call
 for evidence of the marriage. However, should the evidence
 of collusion be controverted on the part of the lady, the chief
 of argument for her, I conceive, must be the various
 provisions against fraud and collusion in particular.
 But the obvious answer to any reasoning from them is,
 that the sentences, on which I rely, are independant of any le-
 gal aid. The case of Prudam and Phillips, which was once
 taken to be an authority against giving evidence of collusion
 in a sentence of the spiritual court, appears by Mr. Ford's
 to be an authority the other way, the evidence being refused
 because Mrs. Phillips, who offered it, was herself one of
 the parties; and it seemed to be agreed both by court
 and counsel, that it would otherwise have been admissible.

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As to Hatfield and Hatfield, I apprehend that the point of collusion was not before the lords. However, as in the real case the appellant's case the sentence is called collusive, it was proper to examine the printed case accurately *.

*It is fit to apprise the reader, that the two questions which are the subject of the preceding argument, when the case came on for trial, were referred to the lords, and that their answer to the first question was contrary to the opinion, which was previously to the trial had been given by the editor.

The questions to the judges were,

1. Whether a sentence of the spiritual court against a marriage in a suit for nullity is conclusive evidence, so as to stop the counsel for the crown from bringing in the said marriage in an indictment for polygamy?

2. Whether, admitting such sentence to be conclusive upon such issue, the counsel for the crown may be admitted to avoid the effect of such sentence by proving the same to have been obtained by fraud or collusion?

The opinion of the judges on these questions was unanimous. To the first they answered in the negative, to the latter in the affirmative. It is not necessary to give the words of their answer here, because they are a mere repetition of the questions proposed. The reasons of this opinion, as delivered by lord Walsingham, then chief justice of the common pleas, were thought so important, that the lords requested to have a copy of his argument; which was accordingly given, and is now in print. See State Trials, vol. xi. p. 262.—

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EXCHEQUER CHAMBER

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GIVING JUDGMENT in the CASE

O F

ERRIN and Another against BLAKE,

By the Hon. Mr. Justice BLACKSTONE.

The following argument is printed from the original manuscript in hand-writing of the great modern commentator on the law of England, whose name it bears.

The copy-right was purchased by the editor from one, who derived it to it from the executor of Sir William Blackstone. The case, to which it relates, is shortly given in the judge's printed reports. But this argument is there omitted; which, as the editor conjectures, was owing to the circumstance of its being written on a separate paper instead of being contained in the judge's note-books.]

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R G U M E N T,*

MR. JUSTICE BLACKSTONE,

delivering Judgment in the Exchequer Chamber,

In PERRIN and Another v. BLAKE,

Wedn. 29 Jan. 1772. Hilary 13 G. III.

ON the fullest consideration which I have been able to give to this case, I am of opinion, that the judgment of the king's-bench is erroneous and ought to be reversed. I conceive, that the great and fundamental maxim, upon the construction of every devise must depend, is, "that the intention of the testator shall be fully and punctually observed,"

to which this argument by the late Mr. Justice Blackstone, belongs, and for having attracted the attention of Westminster-hall for many years. In printed books of deserved authority, there is an account of the case of Blackstone, Sir James Burrow, and Mr. Fearn, all state as much of the construction of which the case depended, as is necessary for understanding the force of any of the arguments. Mr. Douglas has in his Reports added particulars, relative to the manner in which the case came before the court, and its subsequent progress. But one full and connected account of the proceedings whence the litigation sprung, with the particulars of its long progress through the courts of Jamaica and the privy council, and afterwards to Westminster-hall to the house of lords, has not yet appeared in print. It occurred to the editor, that his endeavours, to collect and digest the materials for that purpose, might enable him to perform a service both useful and agreeable to professional readers.

The first point of the case from the beginning was the validity of a jointure of 1000l. given by a Mrs. Williams out of a Jamaica estate said to be about three years' value. Her claim was immediately founded on a settlement, made by her after marriage, but in pursuance of articles before, by her husband, John Williams, Esq; The question was on his right to make such a settlement; it depended on the construction of a devise to him in the will of his father, John Williams, Esq; If the will passed an estate tail to John Williams, he had the acts requisite by the laws of Jamaica for barring entails, the jointure was effectual. If the will passed only an estate for life, the jointure was not effectual. Whether also the former or latter of these constructions ought to prevail, chiefly to be decided by a consideration of the rule of law, thus expressed in his report of Shelley's case; namely, "that when the ancestor by his conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee

" or

4 Burr. 672. 4 Burr. 2579. Fearn on Conting. Rem. 3d. Ed. 110. Douglas in a note, and Mr. Fearn's copies of opinions of counsel in Perrin, printed in 1780.

*See Manderill
the case of
Perrin v. Blake
in 3. Irish
Cas. in Parl.
352 b
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is therefore essential to a free and commercial country :—
 went farther, every man would make a law for himself; the
 and boundaries of property would be vague and indetermi-
 which must end in its total insecurity. But

eds, bills, and any otherwise as they shall become due, to be remitted in
 or bills as aforesaid. And I give to my executors full power and lawful
 ority to authorize the said South or some other substantial knowing man to
 out the said monies in good landed estates. And lastly, I do hereby nomi-
 and appoint my loving wife, during her widowhood, executrix and guar-
 together with my loving friends Isaac Gale, Jonathan Gale, Esquire, Bar-
 Lewis Esquires, John Gale and Thomas Woolley senior, executors and
 adians to my children during their minorities."

the devisee in trust in this will, died before the testator.
 the 4th of February 1723, the testator died, leaving issue John Williams his
 son and heir, and the three daughters named in the will.—The testators wife
 deceased at his death or at any time after, and died 1st of March 1723.

February 1743, the testator's son John Williams came of age; and conceiv-
 himself to be seised in fee tail under the will of his father, he immediately made
 conveyance of the devised plantation in Jamaica, as by the law of that island
 valent to a common recovery here.

March following John Williams executed a settlement in pursuance of mar-
 articles made whilst he was under age: and by this settlement the plantation
 by his father's will was conveyed to trustees and their heirs to the uses fol-
 ; namely to the use of John Williams for life; remainder to the use of trust-
 ing his life to preserve contingent remainders; remainder to the use and
 that Sarah his wife, if she survived him, might receive out of the premises,
 her life, a clear yearly rent charge of 1000l. British money, payable at the
 Exchange London quarterly, with powers of distress and entry; and subject
 rent-charge to the use of John Sharpe, William Perrin, and Thomas Vaughn,
 their executors administrators and assigns for 400 years, for securing the rent-
 ; remainder to the first and other sons of John Williams by the said Sarah
 e, successively in tail male: remainder to John Williams in fee.

the 31st of December 1744, John Williams died without issue, leaving Sarah
 widow, and his two sisters, Bonella the wife of Norwood Witter and Hannah
 the of Benjamin Blake, his coheirs, Anna the other sister having died unmar-
 his life-time.

1745, immediately after the death of John Williams, the husbands of his two
 sisters and coheirs in their right entered into the plantation so devised and
 and became seised. Mr. Blake and his wife brought an action against Mr.
 Witter and his wife in the superior courts of Judicature in Jamaica for
 tion, and obtained judgment for that purpose; which judgment was after-
 executed by an actual partition under a writ to the provost-marshal.

at this partition the wife of Witter died, leaving William Witter her son and
 and Benjamin Blake also died, leaving the said Hannah his widow.

William Witter and Hannah Blake controverted the validity of the jointure
 pl. a year to Mrs. Williams the widow, on the ground, that her deceased
 John Williams was a mere tenant for life under the will of his father, and
 could not bar the entail thereby created.

by this point, which depended on the question, how the remainder in the
 William Williams to the heirs of the bodies of his sons John Williams and
 born infant therein referred to ought to be construed, Perrin and Vaughan,
 living trustees of the term of 400 years for securing Mrs. Williams's jointure,
 two ejectments in the supreme court of judicature at St. Jago in Jamaica.
 brought against William Witter, for that part of the plantation in his pos-
 sion of the partition; and the other against Hannah Blake, for the part al-
 her. In both these ejectments the judgment of the supreme court was
 Mrs. Williams's trustees. Writs of error were brought on both judgments in
 the

But there is, I will acknowledge, a distinction to be though too often confounded or forgotten, in what is meant by those *rules of law*, which must co-operate with the intention of the testator, in order to effectuate his devise.

the court of appeals and errors in Jamaica, which consists of the governor and council. But the fate of the two writs of error there was different; the writ of error in the ejectment against Mr. Blake being reversed; but the other against Mr. Witter, which was not heard till several years afterwards, being affirmed.

On both judgments in the court of appeals and errors in Jamaica, there was an appeal to the king in council.

What was done by the privy council on the appeal against Mr. Witter, I am not informed of.

But, in respect to the appeal to the privy council brought by Mr. Perrin and his co-trustee against Mrs. Blake, it appears to have taken the following course.

The lords of the privy council, conceiving that the record brought before them was for want of a special verdict too imperfect, therefore reversed the judgment of the court of appeals in Jamaica, but with a direction not to prejudice the defendant, and a recommendation of a special verdict on a new ejectment to be brought by Mrs. Williams's trustees. Accordingly a new ejectment was prosecuted by Mr. Perrin and his co-trustee Mr. Vaughan; and a special verdict being found by the court of appeals in Jamaica and the court of appeals or errors there, a judgment was given for Mrs. Blake the defendant, the plaintiffs appealed to the king in council. In July 1765, the cause came on to a hearing before the lords of the committee of the privy-council. But lord Mansfield, being the only law lord then attended the council, did not chuse, that a question, of so general a nature in respect to all the landed property in England, should be decided by his opinion; and therefore it was agreed, that the appeal should be adjourned, till the solemn adjudication of the point arising on the will of William Williams could be obtained in Westminster-hall. For this purpose a case was at first prepared, and an opinion of the court of king's-bench, and signed by the counsel on each side, such a reference from the cockpit to one of the courts of Westminster being made. It was at length agreed to take the opinion of the king's bench in a feigned writ of trespass, in such a way, as to give the benefit of a writ of error to the court of king's chamber, and from thence to the house of lords. Accordingly a record was made for the king's bench to this effect.

Messieurs Perrin and Vaughan, the surviving trustees of the term of sixty years for securing Mrs. Williams's jointure, brought trespass against Hannah Blake for forcibly entering upon the plantation in Jamaica, with intent to lay the action in a parish in Middlesex. To the declaration on this trespass the defendant pleaded as to the force not guilty; and as to the residue of the declaration that William Williams being seised in fee devised the premises to his son John Williams for his life, remainder to the defendants and the two other daughters of the testator in fee; that the testator died seised 4 Feb. 1723; that the two other daughters and the son John died; and that on John's death defendant entered into possession seised. To this plea the plaintiffs put in a replication, stating the will of William Williams at length and his death; that Isaac Gale mentioned in the will died the testator; and that afterwards John Williams suffered a common recovery of the premises, which was done, instead of stating the real fact of the same operating as a bar of entails according to the law of Jamaica, in order to determine the point, as if the estate actually was situate in England; and that John Williams becoming seised in fee devised to the plaintiffs for a term of years, who entering under this term were trespassed upon by defendant, and a declaration. To this replication the defendant demurred; and plaintiffs demurred, the case was thus brought before the court of king's bench for judgment.

* Dougl. Rep. B. R. 329. in a note.

of these rules are of an essential, permanent, and substantial kind; and may justly be considered as the indelible landmark of property, irrevocably established by the well-weighed law, which have stood the test of ages, and which cannot

these pleadings, in various parts of which some of the real facts were variously omitted, in order I presume to accommodate the record to the shortness of bringing forward the true point in issue, the case came on to a hearing at the king's bench, in Easter term 9 G. 3,* when Mr. Serjeant Walker argued for the plaintiffs, and Mr. serjeant Glyn for the defendant. It was argued a second Trinity term following, by Mr. serjeant Burland for the former, and by Mr. solicitor-general for the latter. The judgment of the court was given Trinity term 10 G. 3. for the defendant Mrs. Blake; lord Mansfield chief justice and Aiton and Willes justices holding, that John Williams took merely an estate for life; but Yates justice being of opinion, that the remainder to the heirs of John Williams the tenant for life were words of limitation, and that the estate tail to him.

A writ of error was brought upon this judgment in the exchequer chamber, and was argued several times, of which the last was in May 1771. After a delay of above seven months, the judges of the exchequer chamber delivered their judgment *in banc* on the 29th of January 1772; and then it was, that Mr. justice Glyn delivered the following argument,

The result was a judgment of reversal, by the opinions of seven judges against the chief baron Parker, Mr. baron Adams, Mr. justice Gould, Mr. baron Aiton and the justices Blackstone and Nares, being all against the judgment of the king's bench, and lord chief justice De Grey the only judge for it.

The whole therefore eight judges were for an estate tail in John Williams, and one for an estate for life.

A writ of error was next brought in parliament to carry the point for a final decision to the house of lords. This writ of error was kept depending for several years, without either party's choosing to force on a hearing. But at length a compromise took place between the parties; and on a petition from them to the house of lords representing the compromise, that house on the 7th of May 1777 ordered the writ to be entered on the writ of error; and that the record should be removed to the king's bench for executing the judgment of that court, as if no writ of error had been brought into that house.

This famous case of Perrin and Blake at last ended by a compromise, after a delay of above thirty years; the trustees for the widow of John Williams, the wife of whose jointure of 1000l. a year was from the beginning the subject in dispute, appearing by the precedent state of the case to have commenced their first petition to establish the jointure as long ago as the year 1746.

It is particular, that under any circumstances a lady should not be able to recover whether her jointure was good or not without waiting for upwards of thirty years; and that at last the business should have no decision, but terminate in a compromise between the contending parties.

It is certainly a misfortune to the lady, whose interests were at stake, that the law should take such a turn, that her jointure could not be decided upon, without its being supposed as a final precedent for explaining a rule of law of general importance, about which there has lately prevailed amongst professional persons an opinion of diversity of sentiments, and by the mode of applying which the titles and real property of the country are ever liable to be most essentially affected.

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Blackst. Rep. 672. 4 Burr. 2579.

It is with what follows seems to make it doubtful, whether the judgment of the king's bench or of the exchequer chamber was in point of form to be executed.

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be exceeded or transgressed by any intention of the testator it ever so clear and manifest. Such as, that every tenant in fee-simple or fee-tail shall have the power of alienating his land by the several modes adapted to their respective interests; no disposition shall be allowed, which in its consequences tends to a perpetuity;—that lands shall descend to the eldest son *alone*, or to *all* the daughters or sisters in part. These, and a multitude of other fundamental rules of property in this kingdom, are founded on the great principles of public convenience or necessity, and therefore cannot be shaken or altered by any whim or caprice of a testator, however fully and explicitly expressed. A condition not to alienate is void, when annexed to a devise in fee, or in tail:—an executory devise tends to a perpetuity, by depending on so distant a contingency as the general failure of issue, is totally null from the beginning—and no man would be suffered to direct, that his land should be descendible for the future to *all* his male issue, or only to the *eldest* of his female.

But there are also certain other rules of a more arbitrary, technical, and artificial kind; which are not so sacred as the former, being founded upon no *great principles* of legislation or public policy. Some of these are only rules of interpretation or evidence to ascertain the intention of parties, by annexing particular ideas of property to particular modes of expression: so that when a testator makes use of any of those technical modes of expression, it is evidence *prima facie*, that he means to express the self-same thing, which the law expresses by the self-same words.—Thus, if a man devises his land, being freehold, to another generally, without specifying the duration of his estate, the devisee shall be only tenant for life:—if he devises in any other manner a *chattel* interest, the devisee shall have the total fee:—a devise to a man *and his heirs* shall give him the fee; absolute dominion; to a man *and the heirs of his body*, shall give him a more limited inheritance.

Lastly, there are some rules, which are not to be reckoned among the great fundamental principles of juridical policy, but are mere maxims of positive law deduced by legal reasoning from some or other of these great fundamental principles. Such as, that a man cannot raise a fee-simple to his own right heirs, by the *name* of *heirs*, as a *purchase*; or, to bring it home to the facts now before the court, that a devise of lands to a man for his life, and afterwards in any part of the same will a devise of the same lands to the heirs of his body, shall constitute an estate in the first devisee for life.

Some of these rules, of the second and third class, are rules of a flexible nature than those of the preceding kind, and admit of many exceptions; whereas those admit of none. For, if the intention of the testator be *clearly* and *manifestly* contrary to the legal import of the words, which he has thus hastily and heedlessly made use of, the technical rule of law shall give way to this *plain* intention of the testator. This has been clear for four centuries at least, if not longer. It is said by the law in 9 Hen. 6, fol. 24, that a devise is *marvellous* in its consequences; and many instances are given, where it may counteract the ordinary rules of law. The like doctrine is to be met in every reporter since; and is the same that obtained in the construction of uses before the statute. In the *uses* (says lord Bacon of Uses 308, 8vo edit.) the chancellor will consult with the rules of law, where the *intention* of the testator does not *specially* appear. But then, this intention of the testator, which is to ride over and controul the legal operation of his own words, must be "*manifest and certain and not equivocal or doubtful*," as was resolved by all the judges of England in *Wild's case*, 6 Rep. 16. Or, according to the emphatical words of lord Hobart, 33, "the intent must *not be conjectural, but the declaration plain*." Which words of lord Hobart, as he adopted and construed by lord Hardwicke, in *Garth v. Wynne*, 2 Vez. 646, must mean, "*plain expression or direct implication* of his intent. But if that intent be uncertain, if it be in *æquilibrio*, or even in suspense or doubt, then afterwards adds) the legal operation of the words *must take place*." And most certainly his lordship has laid down and adhered to the rule with that sagacity and caution, which so fully distinguished his decisions. For as, on the one hand, it would be very unreasonable to *controul* the *plain intent* of a testator by the technical rules, which were principally contrived to *ascertain* the intent; so, on the other hand, where the intent is obscure and doubtful, and liable to a variety of conjectures, it is the safest way to adhere to those criterions, which the law has established for ages together, for the certainty and quiet of property. Every testator, when he uses the words, shall be supposed to use it in its legal meaning, unless he *very plainly* declares that he means to use it otherwise. The contrary doctrine should prevail; if courts either of equity (in both of which the rules of interpretation must be the same) if these or either of them should indulge an unlimited latitude of forming *conjectures* upon wills, instead of adhering to their *grammatical* or *legal* construction, the consequence must be endless litigation. Every title to an estate, that

that depends upon a will, must be brought into Westminster Hall: for if once we depart from the established rules of interpretation, without a *moral certainty* that the meaning of the testator requires it, no interpretation can be safe till it has received the sanction of a court of justice. For how can a client or a pleader be assured, that the conjectures of the most able lawyer or the most experienced conveyancer, will be in all points the same as the conjectures of the judges or the chancellor? A civilian of some eminence, Mantica, has written a learned treatise on their law, which he has entitled, *de conjecturis ultimis*; but I hope never to see such a title in the law of England. For, should such a doctrine ever prevail in this country, it were better that the statute of wills should be totally repealed, than be made the instrument of introducing a vague discretionary law, formed upon the occasion from the circumstances of every case; to which no precedent can be applied, and from which no rule can be deduced.

The principles being thus cleared, upon which I have ventured to found my present opinion, I shall now proceed to enquire what is the legal and technical import of the words made in this devise;—and will then consider whether there is any *manifest* intention of the testator, to be gathered from the part of his will, which may controul and overrule the legal interpretation of the words; and at the same time be consistent with the fundamental and immutable rules of law.

The words which are material to be considered, in the case that has happened (when stripped of all embarrassment from contingency, which never arose, of the birth of a posthumous son†) are the following:—“*Item, and it is my intent and desire, that none of my children should sell and dispose of any part of the estate for longer time than his life: and to that intent I have devised and bequeath all the rest and residue of my estate unto my son John Williams for and during the term of his natural life; and after his decease the remainder to my brother in-law Isaac Gale and his heirs for and during the natural life of my said son John Williams.*”

† Mixing the devise to the unborn infant, with that to the son living, has never been taken advantage of for the jointress when the will was before the privy council, as appears by the two first reasons in the printed case on her behalf submitted by Mr. Yorke and Mr. De Grey. For in them it was contended,—first, that the testator intended the devise of the premises should take place only in the case of a posthumous son, and that all the devises and limitations depended upon that event, and that as there was no posthumous son, the estate descended to the son living, and that for want of the birth of a posthumous son the devise to the moiety devised to him could not operate.—EDITOR.

the remainder to the *heirs of the body* of my said son John Williams, lawfully begotten or to be begotten; the remainder to my daughters for and during the term of their natural lives, equally to be divided between them; the remainder to my said mother-in-law Isaac Gale and his heirs, during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters, equally to be divided between them. And I do declare it to be my will and pleasure, that the share or part of any of my said daughters, that shall happen to die, shall immediately vest in the heirs of her body in manner aforesaid."

It is necessary to take notice, that Isaac Gale died in the lifetime of the testator, whereby the remainder limited to him and his heirs for the life of John Williams became, in point of law, void and devise.

The disposition therefore, at the death of the testator, stood "to John Williams for the term of his natural life; the remainder to the heirs of his body," without any interposing.

The legal consequence of which is, that if this be an estate tail in John Williams, it is an estate tail *in possession*, by immediately uniting with the life-estate; and not an estate tail *in remainder*, as in the cases of *Duncomb and Duncomb*, and *Coulson and Coulson*, it was held to be, by reason of the interposing estate, which subsisted in both those cases. And indeed, were it otherwise, the plaintiff's replication could not be supported upon this demurrer; for therein he pleads, that "by virtue of the will, John Williams entered into the close in question, and became seised thereof in his demesne *as of fee tail*, to-wit, him and to the heirs of his body issuing." How far the disposition of this estate, to Isaac Gale and his heirs, though it took effect, is an evidence of the testator's *intention*, afterwards come to be considered. At present the only question is, what estate is by these words devised to John Williams, according to the general rule of law, uncontrouled by other considerations. And I apprehend there is no doubt, but that the will, in their legal construction, convey an estate tail to John Williams.

The rule of law, as laid down in *Shelley's case*, 1 Rep. 104. is, that "where the testator takes an estate of freehold, with a remainder, either for life or immediate, to *his heirs*, or the *heirs of his body*, the word *heirs* is a word of limitation of the estate, and not of purchase;" that is, in other words, that such remainder shall descend to the ancestor himself, and the heir (when he takes) shall take by descent from him, and not as a purchaser.

This rule, though too plain and positive to be openly questioned.

ed or denied, has yet been obliquely reflected on; and institutions have been thrown out, that it is a *strict* and a *narrow*—founded upon feodal principles, which have long ago ceased—that in *Skelley's case* it is only laid down *arguendo* by the court and not by the court;—and that too in the case of a *deed* and not of a *will*.—It will not therefore be foreign to the present question to make a short enquiry into the *reason*, the *antiquity*, and the *extent* of this rule.

Were it strictly true, that the origin of this rule was feodal, and calculated solely to give the lord his profits of (either wardship or relief) upon the descent to the heir from his ancestor, of which the lord might be defrauded if the heir were to take by purchase, of which (by the way) I have never seen a single trace in any feodal writer;—still it would not impeach the authority of the rule, or make us wish for an opportunity to evade it. There is hardly an antient rule of real property which has in it more or less of a feodal tincture. The common law maxims of descent, the conveyance by livery of seisin, the whole doctrine of copyholds, and a hundred other instances which might be given, are plainly the offspring of the feodal system; but, whatever their parentage was, they are now adopted into the common law of England, incorporated into its body, and interwoven with its policy, that no court of justice in this kingdom has either the *power* or (I trust) the *inclination* to disturb it. The benefit of clergy took its origin from principles of policy, but is there a man breathing, that would therefore now wish to abolish it? The law of real property in this country, when its materials were gathered, is now formed into a fine and complete system, full of unseen connexions and nice dependencies, so that he that breaks one link of the chain, endangers the dissolution of the whole.

But it is by no means clear, that this rule took its rise from feodal principles. I am rather inclined to believe, that it was first established to prevent the inheritance from being in *abeyance*. For, though it has been the doctrine of modern lawyers in order to effectuate executory devises, that, where a limitation of the inheritance depends in contingency, an *interim* heir must descend to the heir until the contingency happens, yet it is not so well known to any one the least conversant in our antient books, that during the pendency of a *contingent remainder* in fee, the inheritance was formerly always (and in some cases for many years) held to be in *abeyance*, or *in nubibus*, as they then expressed it. Thus if a gift be made to one for life, remainder to the right heirs of J. S. then living, the fee simple is in suspense

ance during the life of J. S. Bro. t. *Done*. 6. And so is Co.
 342. b.
 this state of abeyance was always odious in the law ; and
 fore the *whole* freehold or frank-tenement could not be in
 abeyance, except in the single case of the death of a parson,
 or corporation sole. Dyer, 71 Hob. 338. For in that inter-
 val there could be no seisin of the land, no tenant to a præcipe,
 or ability to protect it from wrong or injury, or to answer
 the calls or services. And this is one principal reason, why
 a particular estate for years is not allowed to support a contingent
 remainder ; that the freehold may not be in abeyance : as is laid
 down in Hob. 153.

when the *first* or particular estate was a *freehold*, there in-
 deed the law allowed the *inheritance* to be put in abeyance,
 upon the creation of a contingent remainder ; but this very spa-
 ce was with great reluctance. For, during such a beyance of
 the inheritance, many operations of law were totally suspended.
 The particular tenant was rendered dispunishable for waste : for
 an instance of waste can only be brought by him who is intitled to
 the inheritance. The title, if attacked, could not be completely
 defended : for there was no one in being, of whom the tenant of
 the freehold could pray in aid to support his right. The mere
 right, if subsisting in a stranger, could not be recovered in
 an interval : for, upon a writ of right patent, a lessee for life
 could not join the issue upon the mere right. 1 Roll. Abr. 686.
 For among other reasons, the law was extremely cautious
 in admitting the inheritance to be in abeyance, unless in very
 rare cases ; as is laid down by Hobart and Doddridge,
 Rep. 502. 506. Hob. 338. Indeed, where the particular
 estate was made to A. for life, with remainder to the right heirs
 then living, there till the death of B. the inheritance was
 not in abeyance ; for B. the ancestor, was intitled to
 it. But, where the ancestor had already an estate of free-
 hold, and was intitled to *him*, the law (to prevent such abeyance) adjudged
 the subsequent remainder to *his* heirs (who, during his life,
 were certain) was a remainder vested in the ancestor himself,
 and his heirs shall claim by descent from him. For, as
 Lord J. says in 11 Hen. 4. 74. " if land be given to a man
 for term of his life, the remainder in tail, and for default of
 issue the remainder to the right heir of the first tenant, the re-
 mainder in fee simple takes its being by the possession which
 the first tenant hath." And though in this case it was argued
 that the fee was *in nubibus* or in suspense, yet this was

strongly denied both by him and by *Hill*, another of the judges. And indeed, if we consider it attentively, the whole of this amounts to no more than what happens every day in the creation of an estate in fee or in tail, by a gift to A. and to his heirs for ever, or to A. and to the heirs of his body begotten. The first words (*to A.*) create an estate for life: the latter (*to his heirs or the heirs of his body*) create a remainder in fee or in tail; and the law, to prevent an abeyance, refers to and vests in the ancestor himself; who is thus tenant for life, with an immediate remainder in fee or in tail: and then, by the conjunction of the two estates, or the merger of the less in the greater, he becomes tenant in fee or tenant in tail in possession. Hence therefore I am induced to think, that one principal foundation of this rule was to obviate the mischief of too frequently putting the estate in suspense or obeyance.

Another foundation might be, and was probably, laid in a principle diametrically opposite to the genius of the feudal institutions; namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce, one generation before the other, by vesting the inheritance in the ancestor, than if he were tenant for life, and the heir was declared a purchaser. Therefore, where an estate was limited to the ancestor for life, afterwards (mediately or immediately) to his heirs, who are certain till the time of his death; the law considered the ancestor as the first and principal object of the donor's bounty; and therefore permitted *him* (who, as it is said, Co. Litt. 22. bears his body all his heirs, and who had the only visible and not freehold in the land) to sell it, devise it, where the custom permitted, or charge it with his debts and incumbrances. And however narrow and illiberal the original establishment of this rule, or the adhering to it in later times, may have been represented in argument, I own myself of opinion, that those constructions of law, which tend to facilitate the sale and circulation of property in a free and commercial country, and which make it liable to the debts of the visible owner, who derives a credit from that ownership;—such constructions, I say, are founded upon principles of public policy altogether as open and enlarged, as those which favour the accumulation of property in private families, by fettering inheritances till the full posterity now unborn, and which may not be born for a century.

T. 5 E. 3. Then, as to the antiquity of the rule in question, it has
Discent. 14 said, that in *Shelley's* case it is only urged by the counsel
M. 17 E. 3. defendant in their argument, and not relied on by the
64. M. 24.
F. 3. 30. 24.
E. 3. 57. Bro. Sci. fac. 176.

the determination of the court is grounded on this rule, as in *Shelley's case*, as in the *case of the Earl of Bedford, Moor* where the same rule is likewise argued from by the counsel, known and undeniable maxim. And lord Coke in his commentary on Littleton (the great result of all his experience) has adopted and relied upon it; and has cited in his margin, support it, a long list of authorities from the year-books; by those of Edward the third. I have looked into all these, into some besides; and shall only say, that they do most expressly warrant the doctrine extracted from them by that great learned judge.

There is one case, which I have never seen cited, and which is far the earliest of any that have occurred to me upon a diligent search. In this the question before the court was, whether estate thus circumstanced (that is, settled on a man for life, after an immediate remainder in tail, to the right heirs of the man for life) was, on failure of the remainder in tail, liable to the debts of the tenant for life; and it was determined to be so, upon the ground of its being a fee simple vested in the ancestor; and therefore vested in him, in order to prevent the inheritance from being in abeyance. This, I believe, is the very first in our books, wherein this principle was established. It is in the year-book of Edward 2d, published by serjeant Maynard, 8 Edw. 2. fol. 577. And the case was this, "John Abel, having two sons Walter and John, purchased the manor of Fortyngrey in Kent; to hold to himself and Matilda his wife, and Walter Abel his eldest son, and to the heirs of the body of Walter begotten; and, if Walter died without heir of his body, the manor should remain to the right heirs of John the father. Matilda the wife died; and Walter the son also died without heir of his body. John the father became bound in a statute merchant to pay 100l. to B. at a day certain; and died, leaving his younger son John his heir. After the day of payment was elapsed, the creditor sued out a writ to the sheriff of Kent, to extend and deliver to him all the lands which John Abel the father had, on the day of acknowledging the statute. The sheriff returns, that he had delivered to other creditors upon recognizances all the lands which John Abel had in fee, except the manor of Fortyngrey, in which he had only an estate for term of life. Upon this return it was argued, that John the father had only the freehold for term of life, the fee simple being limited to his heirs, who therefore took by purchase and not by descent. But the court held the contrary; for which this reason (among others) is given by *Sto-ry* viz. *because otherwise the fee and the right, after the*

M. 27 E. 3.

11.

27. Aff. pl.

60.

H. 30 E. 3. 4

P. 32 E. 3.

Fitzh.

Relief. 4.

37. Aff. pl.

4.

M. 38 E. 3.

17. 26.

39 E. 3.

Fitzh.

Discent. 5.

H. 40 E. 3. 9.

P. 40 E. 3. 20.

T. 45 E. 3.

19.

5 E. 4. 2.

"death

" death of *Walter the eldest son*, would have been in nobody.
 " therefore *Beresford C. J.* gave the rule, that execution sh
 " be awarded upon this manor of *Fortysgray*."

The rule of law, deducible from hence, is well and emp
 cally collected by *Fitzherbert*, in his abridgment, t. *Feoffm*
 pl. 109. who refers (I presume) to this case (though it was
 then in print) when he says, that it was resolved in *M. 18*
 " 2. that if a man give land to *B.* for term of life, remain
 " *C.* in tail, remainder to the right heirs of *B.* in fee, thi
 " mainder in fee vests in *B.* as much as if the remainder w
 " mited to *B.* and his right heirs in fee; and the right h
 " *B.* shall have this *by descent and not as purchaser*."

And from all these authorities I infer, that the rule in que
 is a rule of the highest antiquity; not merely grounded on
 narrow feudal principle, but applied, in the first instanc
 know of, to the liberal and conscientious purpose of facilit
 the alienation of the land by charging it with the debts o
 ancestor.

However, it hath been urged, that though the rule mu
 allowed with respect to estates created by *deed*; yet it
 not follow, that it also extends to *devises*: and so the master
Rolls is said to have declared (in the case of *Papillon* and
 2 Wms. 477.) " that he knew of no case, where lands
 " devised to *A.* for life, remainder to the heirs of the body
 " (in case of a will) had been construed an estate tail in *A.*"
 either the reporter has misapprehended his honour's meanin
 else he had surely forgotten the cases of *Whiting* and *Will*
Bulstr. 219. *Rundle* and *Healy*, *Cart.* 170. and *Broughto*
Langley, *Lutw.* 814. wherein that point is resolved in *termin*
 will therefore be sufficient to observe upon this head, that th
 in *Co. Litt.* 22. 319, is laid down in general terms, " *when*
 " *wheresoever* the ancestor taketh an estate for life, &c." and
Co. Litt. 376. and also in *Shelley's case*, and in *Moor 72*
Earl of Bedford's case, it is extended to all conveyances. And
 viles of lands (which differ totally from testaments of cha
 are held in all our books, and particularly in *Windham* and
wynd, 1 *Burr.* 429. to be a species of conveyance; and this
 reason why lands purchased after the execution of it, cannot
 by such a devise.

But, however strongly this rule may be founded in anti
 and supported by reason and authority, I have in the outfee
 ceded, that when it is applied to *devises*, it may give way
 plain and manifest intent of the devisor; provided that inte
 consistent with the great and immutable principles of our
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and provided it be so fully expressed in the testator's will, it may be collected from thence by such cogent and demonstrative arguments, as to leave no doubt in any reasonable mind, whether it was his intent or no. Which leads me to the last consideration :

Whether there is any such *plain* and *manifest* intent of the devise, expressed in or to be collected from any part of this devise, may controul the legal operation of the words, and at the same time be consistent with the fundamental rules of law ? And I am of opinion, that there is no such plain intent.

In order to decide this question *clearly*, it is necessary to state the question *clearly*. And first, let us see what the question is *not*.

The question is not, whether the testator intended that his son should have a power of alienation. If that was all, the estate would be soon at an end ; for his intention is most clearly expressed (and it is the only clear intent I can find) that the son should not have such a power. And, if a conveyance were now directed of this estate by a court of equity, it would probably be in strict settlement, according to the case of *Lennard and Earl of Sussex*, 2 Vern. 526. But that and all similar cases directing a conveyance by a court of equity) must be laid out of the present question : for we are now in the case of a *legal* estate executed either one way or the other, and not of an *executory* trust. And if the testator has in fact devised an estate to John, which such a restriction of alienation is incompatible by the fundamental rules of law, the restriction is null and

void again : the question is not, whether the testator intended that John should have only an estate for life. I believe there was an instance, when an estate for life was expressly devised to the first taker, that the deviser intended he should have nothing more. But if he afterwards gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law that in this case supervenes his intention (as Lord Hale expresses it, 1 Ventr. 225. 379.) and vests the remainder in the ancestor : which remainder, if it be *immediate*, gives his estate for life, and gives him the inheritance in possession ; but if *mediate* only, by reason of some interposing estate, it vests the inheritance in the tenant for life, as a future interest, to take effect in possession when the interposition is determined. And therefore it has been frequently adjudged, that though an estate be devised to a man for his life *only*, or for life *in aliter*, or with any other restrictive expressions ; yet, if afterwards added apt and proper words to create an estate of inheritance in his heirs or the heirs of his body, the extensive

tensive force of the latter words shall overbalance the strictness of the former, and make him tenant in tail or in fee. These therefore are *not* the true questions in the present case.

But I apprehend the true question of intent will turn, not on the quantity of estate intended to be given to *John the ancestor*, but upon the nature of the estate intended to be given to *the body of his body*. That the ancestor was intended to take an estate for life, is certain: that his heirs were intended to take after him, is equally certain: but *how* those heirs were intended to take, whether as *descendants*, or as *purchasers*, is the question. If the testator intended they should take as *purchasers*, then, John the ancestor remained only tenant for life: If he meant they should take by *descent*, or had formed no intention about the matter, the operation and consequence of law, the inheritance first vested in the ancestor. The true question therefore is,—Whether the testator has or has not plainly declared his intent, that the body of John Williams shall take an estate by *purchase*, entirely detached from and unconnected with the estate of the ancestor? or, in other words, Whether he meant to put a stop to the general rule of law, which vests in the son of the ancestor (when tenant of the freehold) an estate to be given to the heirs of his body? But, in order to say this, we must suppose that the testator was apprized of this rule, and meant an exception to it: of which there is no evidence whatever. And here lies the great difficulty, which the defendant's error must encounter. It is not incumbent on the plaintiff to shew, by an express evidence, that his testator meant to *alter* the rule of law; for that is always supposed till the contrary is clearly proved: but it is incumbent on the defendant to shew, by plain and manifest indications, that the testator intended to *deviate* from the general rule; for that is never supposed to be made out, not by conjecture but by strong and conclusive evidence.

Let us therefore see, what evidence has been usually required to demonstrate such a *devious* intention, and what the evidence is that is relied on in the present case.

I am far from maintaining, that by a devise to a man's body or the heirs of his body, they shall never take as purchasers in any case. But I have never observed it to be allowed, except in one of these four situations; not one of which will apply to the present case.

1. Where no estate at all, or (which is the same thing) the idea of our ancient law) where no estate of freehold is

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to the ancestor. Here the heirs cannot take by descent, if the ancestor never had in him any descendible estate. This must always be the case, where the ancestor is dead at the time of the devise, as in the known case of John de Mandeville (Co. Lit. 26.) the heir then taking a vested estate by purchase.

It is also the same, if the ancestor be living, and has no estate devised to him; only that then the estate of the heir is contingent, because *nemo est hæres viventis*. And, if the ancestor has only the devise of a chattel interest, with a subsequent gift to his heirs, the heirs must likewise take as purchasers, or take at all. For, if between the term of the ancestor and the gift to his heirs, there is no vested freehold remainder, the heirs can only take by way of *executory devise*; which, *ex vi termini*, implies an estate *not executed* in the ancestor. Or, if there be any such vested estate of freehold, interposed between the ancestor's term and the contingent remainder to his heirs, that contingent remainder is supported entirely by the interposed estate, and does not derive its being or any degree of assistance from the chattel estate of the ancestor.

The next case is, where no estate of *inheritance* is devised to the heir; as in the case of *White and Collins*, Com. 289. (cited by the counsel for the defendant). There the devise was to Mildmay for life, with a power of jointuring, and after his death, (and jointure, if any be) to the heir male of his body lawfully begotten, during the term of his natural life: remainder to the heirs of his body. Common sense will here tell us, that when no estate of inheritance is devised to the heir male of the body, he cannot take as heir.

The third case is, where some words of explanation are added by the deviser himself to the word *heirs*, in the will: as, "I mean by the word *heirs*, such of my sons as shall be living at the time of my decease." By this he discovers a consciousness, distrust, or apprehension, that he may have used the word improperly, and not in its legal sense; and therefore he in a manner retracts it, he corrects the inaccuracy of his own phrase, and tells every reader of his will how he would have it understood. Thus, in *Burchel and Durdant* (2 Ventr. 311. Carth. 154.) the devise was, "in trust for Robert Durdant for life, and after his decease to the heirs of his body, *now living*." As if the testator had said, "I do not mean a perpetual succession in the male line of Robert Durdant, which perhaps may be the legal sense of *heirs male of his body*; but I mean by that expression only such of his sons as are now present born and known to me." And accordingly the court held, that George Durdant, the son of Robert, and living when

when the will was made, should take the estate *as a pur*
 So in *Lisle and Gray* (2 Lev. 223.) the words were, "to B
 " for life, remainder to his 1st, 2d, 3d, and 4th sons
 " male; and *so* to all and every other the heirs male of t
 " dy of Edward." Which words *and so* (together with t
 nifest reason of the thing) plainly shewed that the "othe
 " male of the body" in the subsequent clause of the will
 to be understood just *so* as the "1st, 2d, 3d, and 4th
 were to be understood in the preceding. And in *Lowe* a
vis (lord Raym. 1561.) when the testator had first devise
 loose unguarded manner, to "his son Benjamin and hi
 " lawfully to be begotten," he immediately recollected
 and adds, by way of explanation, "that is to say, to
 " 2d, 3d, and every other son and sons successively, l
 " to be begotten of the body of the said Benjamin, &c."
 devise to the heirs, thus explained, was held to be by way
 chase. So in the case of *Doe on demise of Long v. Laming*
 1100.) the devise was of *Gavelkind* lands "to Anne
 " and the heirs of her body begotten, *as well female as*
 " *take as tenants in common.*" Now, since *Gavelkind* lan
 not descend to heirs female as well as males (as is c
 declared by the statute *de prærog. regis*, 17 Edw. 2. c. 1
 can heirs, as such, be tenants in common but coparceners
 clear, that by the words *heirs of the body*, (thus explained
 words *female as well as male*, and *to take as tenants in*
 the deviser could only mean to describe the children of A
 nish.

4. The last case, wherein heirs of the body have been
 be words of purchase, is where the testator hath superadded
 limitations, and grafted other words of inheritance upon
 heirs to whom he gives the estate: whereby it appears, th
 heirs were meant by the testator to be the root of a new
 tance, the stock of a new descent; and were not com
 merely as branches derived from their own progenitor.
 the heir is thus himself made an ancestor, it is plain, t
 denomination of *heir of the body* was merely descriptive
 person intended to take, and means no more than "such
 " daughter of the tenant for life, as shall also be heir of
 " dy." The cases of *Lisle and Gray*, *Lowe* and *Doe*
Long and *Laming* fall under this head as well as the other
 having also words of limitation superadded to the word
 well as the explanatory words I before took notice of. T
 in *Cheek* and *Day* (which, as lord Raymond observes,
 24. Fortesc. 77. is the true name of the case usually
Clerk and *Day*) the devise, as there cited from the ro
 " to my daughter Rose for life, and if she marry after my

I have any heirs lawfully begotten, I will that her heir shall have the lands after my daughter's death, and *the heirs of her*." So likewise *Archer's case*, 1 Rep. 66. is "to the next and next heir of Robert Archer, (the tenant for life) to the *heirs of his body* lawfully begotten for ever." And *Backhouse and Wells*, 2 Wms. 476. is "from and to the decease of the tenant for life to the issue male of his body, and to the *heir male of such issue male*."

The cases therefore that have hitherto occurred, from the time of wills to the present time (a period above two centuries) of cases, I say, in which *heirs of the body* have been construed words of purchase, are reducible to these four heads:—where no estate of freehold is given to the ancestor;—where no estate of inheritance is given to the heir;—where other explanatory words are immediately subjoined to the former;—or, lastly, where a new inheritance is given to the heirs of the body:—none of which is the present case. We have therefore no authority from precedents to warrant such a construction as is now contended for.

I do not however say, that this construction can never be supported under other circumstances than those which I have now mentioned: but only, that at present I am not *aware of any* circumstances, than can warrant the same construction. At the same time I allow, that the same construction may and should be made, whenever the intent of the testator is equally clear and manifest.

What then is the evidence of this intent in the present case? It may be resolved into two particulars. 1. The testator's previously declared intention, "that none of his children should sell or dispose of his estate for longer term than his own life," together with his consequent disposition "*to that intent*:" and, the interposed estate to Isaac Gale and his heirs, during the life of the testator's son. For, as to what was mentioned at the time of his making the daughters and the heirs of their bodies to be in common, and directing the share of each daughter to vest immediately upon her death to vest in the heirs of her body;—it is plainly done to prevent the inconvenience of survivorship among the daughters; which must otherwise have been the consequence, according to the rule laid down, Co. Litt. 25. b. that where there is a gift to two women and the heirs of their bodies, they have a joint estate for life, and several inheritance.

Indeed do I think much stress can be laid on the second circumstance, the interposed estate of Isaac Gale and his heirs. For it has been expressly created to preserve contingent remainders, the

the case of *Coulson and Coulson* (2 Ath. 250.) is an express authority, that this will not make the heir of the body a purchaser. Much has been said, and much has been insinuated at the discrediting of that case. But I hold it to have been determined upon sound legal principles. For the misapprehension of a testator, in thinking the remainders were contingent when they were not, cannot alter the rule of law. But were it otherwise, had the case of *Coulson and Coulson* been decided upon dubious grounds, I should tremble at the consequences of shaking its authority, after it has now been established for thirty years, and half the titles in the kingdom are by this time built upon its doctrine. But there is no occasion, upon the present question, to disturb the case of *Coulson and Coulson*, by either affirming or denying it. For the devise to Isaac Gale and his heirs, there is no such express avowed as the preserving contingent remainders: it is only conjectured and guessed at. The purpose of the testator (as in the case of *Duncomb and Duncomb*) to prevent the wife of his son, or tenancy by the curtesy in his daughters' husbands;—especially as he had, by another clause in his will, destroyed the joint-tenancy of his daughters, which would have prevented the wife (according to 2 Roll. Abr. 90.) have prevented the issue of their husbands. And where it is possible there may be more than one intent, the selecting of the true intent is at best a probability and guess-work; and does not amount to that plainness which lord Hobart and lord Hardwicke require, before it shall set aside a positive rule of law.

If this be so, we are driven back to the introductory words of the will, the only evidence of this intent: and then the result of the matter is, that the testator, having declared his intent, that his son shall not alienate his land, he to that intent gives his son the fee to which the law has annexed the power of alienation of the estate to himself for life, with remainder to the heirs of his body. Now, what is a court of justice to conclude from hence, but that a tenant in tail, thus circumstanced, shall be barred of his power of alienation: this is contrary to fundamental principles. —Not, that the devise shall take a different estate from what the legal signification of the words imports: this, without explanatory words, is contrary to all rules of construction. I say plainly and simply this; that the testator has mistaken the law, and imagined that a tenant for life, with first an intermediate fee, and then a remainder to the heirs of his body, could not sell or dispose of this interest.

My lord chief baron on the argument put a question to the counsel for the defendant, to which no satisfactory answer

would be given. The testator's intention was, that his heirs should take the same in fee. A vested estate in fee, the heirs will think, that is a devise to his devisee. Will it be said, that it will supply the deficiency? They have used it into an exception with more to frame a rule at which he will it then be the testator will be to use other. This consequence of law or logic, who has so often employed the which is payable, see how this is intended to use his son from purchase will intended that proposition will were the matter of what evidence of what he intended that the proposition of each thing. Because the matter to the end

ould be given. Suppose, after the like declaration of his intent the testator had devised the premises to his son and his heirs forever;—Would that have made the son tenant for life only, his heirs take as purchasers? Most clearly not. This case is the same in kind, and differs only in species. The words now used are as apt legal words to create an estate tail, as those are to create an estate in fee. And as I conceive, that when a testator has devised an estate, his creation of a trust to preserve contingent remainders will not turn it into a casual executory interest; so I think, that when he has (though ignorantly) devised an estate that is alienable, no previous or concomitant intent to prevent his devisee from alienating shall alter the nature of that

will it be said, that when the testator's intent is manifest, the law will supply the *proper* means to carry it into execution, though they have used *improper* ones? This would be turning every estate into an executory trust, and would be arming every court with more than the jurisdiction of a court of equity; and would be to frame a conveyance for the testator, instead of construing that which he has already framed.

Will it then be said, that because the means marked out by the testator will not answer the end proposed, therefore he intended to use other means and not those which he has marked out? This consequence, I apprehend, will not follow by any rule of law or logic. For then it must be supposed, that every man who has so in view a particular end, knows also and is able to employ the most effectual means to carry it into execution. Which is paying too great a compliment to human wisdom. Let us see how this argument will stand in form.—The testator intended to use those which were the most effectual means to prevent his son from selling his estate; that the son's heir should purchase was the most effectual means: therefore the testator intended that the heir should take by purchase. Here the proposition will not be granted, that he intended to use those which were the most effectual means; for this intent implies his knowledge of what were the most effectual, of which there is no evidence. Or, put it otherwise;—the testator intended to use *what he thought* the most effectual means: but he thought that his son's taking by purchase was the most effectual: therefore he intended that the heir should take by purchase. Here the second proposition can never be proved; that the testator thought that his son's taking by purchase was the most effectual: which is a thing. The true consequence I conceive to be this; because the means marked out by the testator are not adequate to the end proposed, therefore he was mistaken in their

If

If a man proposes to qualify a son to sit in the house of commons, and *to that intent* devises to him an annuity of 300*l.* *annum* for 99 years, if he so long lives —we cannot argue this declared intent of the testator, that this term of years be construed to be a freehold estate for life, because otherwise would not answer the intent. We should rather conclude, the testator was ignorant of the distinction between the two tates, and had unfortunately chosen that which was unfit for purpose.

The case of *Popham* and *Bamfield* (as the two parts of reported in 1 Vern. 79. 1 Wms. 54.) was in this respect stronger than the present. One Rogers had devised a large estate to the testator's Popham's son, on condition that his father should also settle two-thirds of his estate on the son and his *heirs*. Now, though the testator was under a strong obligation, by condition, to give an estate to his son and *his heirs male*; —he recited in his codicil that he *had* devised the lands to his son and *heirs male of his body*; —which were indisputable evidence of his intention to give his son an estate in tail male; —yet, being in his will by express words made his son only tenant in life, with remainder to his first and other sons in tail, the court, assisted by the two chief justices, the master of the rolls, and Mr. Justice Powel, all agreed that the estate must remain in strict settlement. And, if an intention of the testator (manifestly and directly proved) was not in that case sufficient to make the words “first and other sons” be construed “male of the body;” —much less in the present instance, it turn the words “heirs of the body” into “first and other sons.”

Upon the whole, I conclude, that though it *does* appear, that the testator intended to restrain his son from disposing of the estate for any longer term than his life, and *to that intent* chose the present devise; yet, it *does not* appear by any evidence at all, much less by *declaration plain*, that in order to effect this purpose he meant that the heirs of the body of his son should take by *purchase* and not by *descent*, or even that he intended the difference.

The consequence is, that by the legal operation of the devise which are not in my opinion controuled by any manifest intention to the contrary, the heir could only take by descent, and in course John Williams the son was tenant in tail of the premises and duly authorized to suffer the recovery that has been pleaded —and therefore I am of opinion that the judgment below should be reversed.

An. Argum. 1754
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Delivered at the Bar of the House of Lords in June 1782.

Following argument was composed by the editor as junior counsel in
case of an appeal to the house of lords from chancery, and in that
after was actually delivered by him at the bar of the house of lords
written notes. In the course of the argument, the reader will find
discussions of a *general* nature, relative both to the curious and dif-
ficult learning of executory devises of personal estate, and to the impor-
tant distinction between taking *per capita* and taking *per stirpes*, as well
as the distribution of an intestate's personal estate as on legacies. Ex-
cept of the few notes, there is scarce any addition to or alteration
of the argument as it was originally expressed. The state of the case,
as in a note at the beginning of the argument, is an abridgment of
facts by the editor, founded on the printed case before the lords on
part of the appellants. It should, however, be observed, that the
editor is not aware of any material difference in the statement of facts
between the two cases. If there had been any controversy about facts,
he should not have abridged them from the case on one side only.]

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 ON THE
APPEAL from **CHANCERY,**
 IN THE CASE OF
WICKER and SIR THOMAS and LADY BROUGHTON
 AGAINST
JOHN MITFORD, ESQUIRE.*

BY LORDS,

in this case, the general question between the appellants and respondent is, who are entitled to the 5,402l. 7s. 4d. surplus real and personal estate of the testator Wm. Wicker.

On the one hand, the respondent claims the *whole* of this fund as an *executory devise* in the will of William Wicker, on the

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contingency

the appellants were Mrs. Charlotte Wicker, widow and executrix of John Wicker Esq; and Sir Thomas Broughton Baronet, and dame Mary his wife, and only child of the said John Wicker. The respondent was John Wicker Esq; second and only younger son of Mrs. Sarah Mitford, sister of the Wicker.

The subject of the appeal was a sum of 5402l. 7s. 4d. $\frac{3}{4}$ being the surplus of the personal estate of William Wicker, Esq; brother of the said John Wicker Mitford. The respondent claimed the *whole* of this surplus under the will of his uncle William Wicker, as only younger son of the testator's sister Sarah. The appellants claimed the *whole* or at least a *moiety* of the same surplus under the will of Mr. John Wicker, as residuary devisee and legatee of his brother William. The title of the different claimants depended on the construction of the will of Mr. William Wicker, on the contingency of his *dying without issue* the whole surplus of his fortune real and personal, *equally to be divided between his second or younger sons* of his brother John and sister Sarah Mitford.

The substance of the case was as follows:

William Wicker, Esq; having been lately married, and being without issue, by his will, dated the 12th of December 1750, to this effect. After reciting that he was possessed of a fortune of about 6000l. at interest upon securities, and that he was seised of a freehold messuage and malt-house in the parish of Henfield in Sussex, and of a copyhold malt-house in Old Shoreham in the same county, he devised the said messuage and malt-houses unto his brother John Wicker, Esq; and upon trust after testator's decease to sell the premises, and to apply the proceeds of the sale in manner after directed. The testator next gave to his wife an annuity of 100l. for her life payable quarterly, upon a condition that *he*
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contingency of his *dying without issue*, to the *second* or *younger* sons of his brother John Wicker and his sister Sarah Mitford

did not LEAVE any child, or more than two children, at the time of his decease; he should leave three or more children living at the time of his decease, then only for her life. Next he gave the use of some household furniture to his wife for her life. Then the will goes on in the words following. "And whereas I lately married, so that it is very uncertain what children it may please to bless me with; therefore under such uncertainty I do make the following fiction of my fortune, (that is to say) In case I should leave one only son, other child, then I do give such only son the whole of my fortune of die possessed; and if I should leave one son and one daughter, then I give the sum of 4000l. and to such daughter the sum of 2000l. and should leave two or more sons and no daughters, then I do give the substance and fortune to be equally divided between them share and share. And in case I should leave no son, but one or more daughter or daughters, then I do give the whole of my substance or fortune to be equally divided between them; if more than one daughter, and if but one daughter, then I do give the whole. And in case I should leave two or more sons, and one daughter or daughters, then and in such case I do give the sum of 4000l. divided between the sons, and 2000l. between the daughters, if more. And in case it shall happen that I should die without issue, then I do bequeath the whole of my fortune or substance equally to be divided between my younger sons of my brother John Wicker, and my sister Sarah, wife of William Esq; by him or any other husband she may hereafter happen to intermarry. And in case it shall happen that my said sister and brother shall not have such second or younger son; then, and in such case, I do give and bequeath the whole of my substance to my said brother Wicker and sister Mitford, to be divided between them, share and share alike, and to their respective executors, administrators. Provided always and my will and meaning is, and I do hereby direct, and appoint, that the several and respective fortunes or portions of my own or my said brother's and sister's children shall be severally and respectively paid unto them by my executor at their several and respective years, with the best interest in the mean time that can be gotten for the several fortunes of my own children, for and towards their support, maintenance and education. And I do give unto my said brother John Wicker and authority to take in and place out my said monies from time to time in such manner as he shall think fit. And I do commit the guardianship of my children unto my said brother, to be brought up and educated in such manner as he shall think fit, in case I shall leave any such at the death; or in case my said wife shall be enfeint or with child at the time of my death and such child shall live: which I hope my said brother will undertake to do. The form, it being my earnest request to him so to do." The testator bequeathed 10l. a-year to his servant John Jones for life, and various annuities to other servants and others, with the lease of a house and farm, and the stock upon the latter to his wife absolutely. Then came the following bequests, "Provided always, and my will and meaning is, that notwithstanding herein mentioned, IN CASE I SHALL DIE WITHOUT ISSUE, and in case I shall have any second or younger son born of her body, that then in such case, I do give and bequeath THE ONE-HALF of my fortune or substance unto my said sister Mitford, if he shall be living at the time of my decease; but in case of his death, and of the death of my sister before me, and in such case, I give the whole thereof unto my said brother Wicker, and his executors or administrators. Also, after the death of my said wife, I give my household goods, plate, and linen (the use whereof I have reserved to my wife for her life) I give and bequeath to my eldest son, if any such I have, or, in default of such, to any daughters I may have, equally between them, share and share alike. Also, if I shall have any son that shall live to attain

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Other hand, the appellants submit, that the appellant Mrs. [redacted], as executrix of the testator's brother John Wicker, is

I will and direct my executor to allow him 10l. a-year for pocket-money, paid him weekly, and to keep a horse to ride upon. And I do nominate, create and appoint my said brother *John Wicker* sole executor of this my last will and testament, and do give him all the rest and residue of my estate not herein bequeathed and disposed of."

the 1st of April 1751, the testator made a codicil giving some small specific

757, soon after this codicil, the testator died without issue, leaving his said John Wicker his heir, and him and his said sister Sarah Mitford his next and also leaving his said wife Elizabeth his widow.

Wicker, the sole executor, proved the will. The testator's brother John Wicker not then having any son, and his wife having an only son William Mitford, an infant, the latter by his next friend brought his bill in chancery against the testator's brother John Wicker and his wife Elizabeth, and John Jones the annuitant of 10l. a-year. By this bill it was insisted that he on the testator's death became entitled to one moiety of the real estate, after payment of debts and legacies, prayed an account, and a moiety of the clear surplus of the testator's real and personal estate placed the benefit of him the plaintiff until he should attain twenty-one, and to terminate in the mean time.

ers having been put in, the cause was heard the 21st of February 1754, in presence of the lord chancellor, before the then master of the rolls, who made a decree. By this decree, after various directions for an account, it was ordered, that the clear surplus of the capital of the testator's personal estate, and the money arising out of his real estate, should be placed out at interest on government or real securities, in the name of trustee to be approved by the master, subject to the directions, and upon the trusts and the contingencies in the will. It was also ordered, that out of the interest the annuities to the testator's widow and to John Wicker should be paid. And the court declared, that the defendant John Wicker should be charged with the surplus of such interest, and to the surplus interest of the testator's personal estate, and to the rents and profits of his real estates accrued since the death of the testator, as residuary legatee: and that when any of such contingencies should happen, any person or persons who should be entitled to the said securities, should be at liberty to apply to the court touching the same, as occasion should require.

In the year 1754 there was a rehearing of the cause on the petition of the then lord chancellor Hardwicke; but the decree was affirmed.

On the 17th of March, 1756, the master made his reports of the accounts directed, and found the clear surplus of money from the testator's personal estate, of his real estate, to be 5402l. 7s. 4d $\frac{1}{2}$.

latter's sister, Sarah Mitford, having had a second son born the 13th of
1754, namely the respondent John Mitford, a petition on his behalf was
in the said cause in March 1756, claiming *one moiety* of the said 5402l.
surplus money as payable at twenty-one, with maintenance in the mean
praying, amongst other things, to have an allowance settled accordingly
interest. But upon the hearing of this petition, the 21st of March 1756,
dismissed by the lord chancellor, on the ground of the petitioner's not being
to the interest before twenty-one.

John Wicker, the brother of the testator William Wicker, died, without issue, and by his will he gave his real and personal estate, subject to his debts, legacies, to his wife the appellant Mrs. Wicker, in trust for such persons as she might think proper to appoint; and it was provided that if she should neglect or refuse to appoint, her executor or administrator should by her will appoint therein.

ember 1775, the respondent, the only younger son of Sarah Mitford, the
he testator William Wicker, attained 21; and in 1777 the respondent's
ed, leaving the respondent, her only younger son.

6, the respondent filed a bill in chancery against the appellants, claiming, as the natural and legitimate son of his deceased mother Sarah Mitford, a right to the *whole* of the surplus money from the real and personal estate of the testator

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entitled to the *whole* of the fund in question, or at least is entitled to a *moiety*.

The material facts on which the claim arises, exclusive of the will of William Wicker, are, that the testator died without having had any issue; that at the time of the will neither brother John Wicker, nor his sister Sarah Mitford, had any younger son; that the brother and sister both survived the testator; that the brother is since dead, without having had any male issue; and that the testator's sister Mrs. Mitford is also living, leaving the respondent *her only younger son*.

The principle of the respondent's claim is, that the testator intended, if there should be several younger sons of his brother and sister, to divide the surplus of his estate amongst such young sons *per capita*; or if there should be only one younger son, whether of his brother or sister, to give the *whole* to him.

Before entering into a discussion of the respondent's propositions, there is a preliminary observation, which I conceive to be material to the interests of the appellants. If the respondent cannot make out his title under the executory devise on the contingency of the testator's dying *without issue*, the title of the appellants, Mrs. Wicker as executrix of Mr. John Wicker, and through her that of Sir Thomas and lady Broughton, follow of course. The testator's brother John Wicker, whom the appellant Mrs. Wicker represents, was the *residuary devisee* and *legatee*, and also executor of the testator; and consequently she is the person to whom the fund in question belongs, till it can be shewn from the will that the respondent or some other person has a better title. This is no small advantage to the appellants: because in the first instance it throws the *onus* of making out a claim entirely on the respondent and consequently the title must remain with the appellants.

William Wicker, subject to the two annuities charged upon that fund by his will, and praying to have such right declared.

The appellants, by their answer to this new bill, submitted to the court, shew that the respondent was entitled to *any* and *what* share of the said surplus money, the real and personal estate of the testator William Wicker; they having proved, that *at the utmost* it was not the intention of his will to give more than one third of such surplus to the second sons of his sister Sarah Mitford; and that the brother John Wicker was, as residuary devisee and legatee of William Wicker, entitled to the whole of his real and personal estate, not otherwise disposed of by his will.

On the 13th of March 1780, the cause was heard before lord chancellor of the Exchequer, who was of opinion, that the respondent was entitled to the *whole* of the surplus money, and made a decree in favour of the respondent accordingly.

The appellants afterwards obtained an order for re-hearing of the cause on the 21st of May 1781, when the re-hearing came on, the decree was reversed.

From this decree Mrs. Wicker and Sir Thomas and lady Broughton appealed to the house of lords.

The appeal was heard before the lords in June 1782, and the following decree was delivered by the editor from written notes as junior counsel for the appellants.

The result was against the appellants, the lords affirming the decree of the Exchequer.

Ans. made by the respondents, and Mr. Wicker, on the 1st of June 1782. At the house of lords.
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construction of the devise the respondent relies on is so difficult, the judgment of those who are to interpret it is arrested by it, and cannot be convinced that the intention of the testator and the rule of law in respect to executory devises are both with the respondent.

In order to see whether the respondent can make good his claim, on the part of the appellants, beg leave to consider it in three points of view.

FIRST, I will consider, whether the *executory devises* on the contingency of the testator's *dying without issue*, as well those subsequent to the devise to the younger sons of testator's brother and sister as that devise itself, are or are not good within the rule of law by which all executory devises are governed.

SECONDLY, I will consider, whether, tho' the executory devise should not be bad for remoteness, the particular executory devise to the younger sons of testator's brother and sister is not so affected, as not to operate in the event which has really happened, namely, there being *no younger son of the testator's brother, and a younger son of his sister only*.

THIRDLY, I will consider, whether, tho' the executory devise to the younger sons of testator's brother and sister be good in law, it also be admitted to have taken effect, it will operate *per stirpes*—that is, by giving one moiety to the younger sons of his brother, and the other to the brother's younger sons, or *per capita*, that is, by giving the whole amongst the younger children of the testator without discrimination.

As to the first of these questions is with the appellants, they are entitled to the *whole* of the fund in dispute; because the devises to the testator's own children, failing from his never having had any, and the devises on the contingency of his dying without issue being void, it is the same as if both sets of devises were out of the will; in which case there is no disposition of the surplus of the testator's estate, except by the residuary devise to the testator's sister, whom the appellants represent. But though the first question should be for the respondent, still if the second is against him, the appellants will notwithstanding be entitled to a moiety of the surplus; for then the surplus by the terms of the will is made divisible in moieties between the testator's brother and sister or their respective representatives, and the appellant Mrs. Wicker, as executrix of the former, is entitled to his moiety. What, according to that construction, would become the moiety of the testator's sister doth not appear by the pleadings, it not being stated who is her personal representative; and consequently it remains to be proved whether the respondent has any interest in it or not. Though too both the first and second of these questions should be decided against the appellant, still the appellant Mrs. Wicker would be entitled to a moiety of the surplus.

surplus in dispute if she prevails in the last question ; because the devise to the younger sons of testator's brother and sister rates *per stirpes*, then there being no younger son of the brother to take the moiety allotted to his younger sons, it falls into the residue of the testator's estate, and consequently belongs to the appellant Mrs. Wicker as executrix of Mr. John Wicker the diary legatee.

FIRST QUESTION.

When executory devises were first permitted, it was foreseen that entails made in that form could not be barred by fines or recoveries.—If they were of *real* estate, the extraordinary devise could not be barred by fine ; because the title of the executory devisee is not *through*, or as *privy* to the immediate taker, quite independent of him : nor could the executory devise be affected by a recovery, it being soon settled, that the recompense which in the supposition of law is the ground of barring the tenant in tail and those in remainder and reversion, doth not extend to an executory devisee (a).—If they were of *personal* estate, whether chattels real or personal, from the nature of the property could not be the subject of either fine or recovery.

Entails by executory devise being thus exempt from any mode of barring them, it became necessary to prescribe bounds and limits to this new species of settlement, lest otherwise they should obtain a longer duration through the irregular and barbarous permitted medium of executory devise, than the law intended where the entail commences in the regular way, by creating estates for life and estates tail with remainders over.

Hence originated the rule both at law and in equity, that a contingency, on which executory devises depend, should be confined to a stated period ; and by analogy to the case of strict entails, which cannot be protected from fines and recoveries longer than the life of the tenant for life in possession, and the attainment of 21 by the first issue in tail, it was at length settled, that the longest period for vesting of an executory devise should be *any life or lives in being and 21 years after* ; to which may be added *a few months more for the case of a posthumous child*. There is every contingency, which is not such, that if it ever happens, it must necessarily be within the period so described, is too remote for an executory devise.

The consequence of thus circumscribing the limits of an executory devise is, that it is not lawful to limit an executory devise on a *general and indefinite failure of issue* ; namely, a failure of issue of the person named whenever it happens, be the time of the event ever so distant. It is equally a consequence of the

(a) Pell v. Brown, Cro, Jam. 590. Pig. on Recov. 129.

if the failure of issue is restrained to the death of any person persons actually living, or to any period not beyond a life and in being and 21 years with a few months beyond, then the contingency is good, and the executory devise has its full effect. If the doctrine of executory devises was *res integra*, and now to be settled, it might be thought a sufficient and more check of them to hold, that they should be good as far as the period, whether the contingency was too largely and widely expressed or not. But our ancestors have not left us a choice ; having been long a fixed rule, that, if the contingency is too late, the executory devise dependant upon it shall not be void so far as it exceeds the line prescribed, but shall fail.

According to this way of considering the rule as to executory devises, the validity of the devise in the present case, which is to younger sons of the testator's brother and sister, if the testator should die without issue, depends simply on this consideration : whether by the intention of the will the testator's dying without issue is the contingency of failure of issue whenever it should happen ; whether it was merely a failure of issue at the time of the testator's death. If the will points at a failure of issue in the former large sense of the words, the respondent's counsel will be supported. If the will points at a failure of issue in the latter restricted sense of the words, the appellants must yield to the respondent, that it is a good executory devise. It is therefore my duty, as counsel for the appellants, to argue for the large sense of the words *dying without issue*.

Now I conceive it to be a settled construction, that the words *dying without issue* do properly and in themselves refer to a general indefinite failure, and that every executory devise limited to effect on such words is void in law, and cannot take effect, if the will contains other words, from which it appears, that the testator did not use the words *dying without issue* in their proper legal genuine and full sense, but intended to restrain them to failure of issue at the time either of his own death, or of the death of other person or persons existing at the time of his will. This seems perfectly settled by the case of *Beauclerk and Dorrington* which was determined by lord chancellor Hardwicke in 1742, and is reported in 2 Atkyns 308. Before this latter case the language of the courts in some former decisions might leave room for misunderstanding, that the words *dying without issue*, in a vulgar and common sense, imported a failure of issue at the time of the death of the person from whom the issue was to come, and that in a will this

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vulgar sense ought to prevail against the *proper* and *technical* but this idea was rejected by lord Hardwicke in the case of *Barker* and *Dormer*, and the rule has been ever since as is stated.

If this be so, the limitations over in the will in question on the event of the testator's *dying without issue*, being decided upon those words separately and distinctly, and without reference to the other parts of the will, must fall to the ground as executors' devises on too remote a contingency.

The first and presumptive construction of the words *dying without issue* being then with the appellants, it is incumbent on the respondent to point out some other passage of the will, which it may be fairly and clearly collected, that the testator applied the words in a sense different from their legal and proper import.

Accordingly it may be argued for the respondent, that the will doth contain expressions and provisions sufficiently special to trouble the legal and presumptive sense of the words *dying without issue*, and to restrain them to a failure *at the testator's death*.

With this view, the counsel for the respondent may perhaps refer to the use of the word *leave* in the devises to testator's sons and daughters. There are four instances in which the testator uses the word *leave* in regulating the distribution among his own children. 1. It is expressed in the will, that if the testator should *leave* but one son and one daughter, then such son should have 4000*l.* and the daughter 2000*l.* 2. If testator should *leave* two or more sons and no daughter, then he gives the whole of his substance to be equally divided between them. 3. If testator should *leave* no son but one or more daughter or daughters, then he gives the whole of his substance between them, if more than one, and if but one, to such daughter only. 4. If he should *leave* two or more sons, and one or more daughter or daughters, then he gives 4000*l.* between the former, and 2000*l.* between the latter. From this use of the word *leave*, especially such frequent use of it, the respondent's counsel may insist, that in expressing the devises over on the contingency of the testator's *dying without issue*, he meant *dying without leaving issue*; and that this, being the same as *failure of issue at the time of his death*, will clearly show the executory devise in question within the compass of the devises prescribed to such devises.

If such an argument should be advanced for the respondent, it may be thus answered.

That a *dying without leaving issue* has been construed in law to mean a failure of issue *at the death of the person named*, I deny; nor do I altogether oppose the cases in which such a

son has prevailed. But I conceive the construction to be incredible here. 1. So narrowing the contingency would have led to create a doubt, whether thereby the testator's posthumous children, if there had been any, would not have been excluded, and so his brother's and sister's children would have been referred to his own issue; which would be not only attributing an unnatural intention to the testator, but also one little consistent with another part of the will, where the testator, in naming guardians for his children, expressly extends the provision to a posthumous child. However, I do not much insist on this observation, because, as in *Willis v. Hodgson*, in 2 Atk. 115. lord Hardwicke held a posthumous child entitled to take within the statute distributions; so perhaps a like-extended construction might be thought equally applicable to a devise, more especially as in the present case the testator, when disposing of the guardianship of his children, includes any child his wife might be *enfeint* with at his decease. 2. If the testator had died leaving no son or daughter, but only a *grandechild*, to construe *dying without issue*, to *mean without leaving a son or daughter*, would also be preferring his brother's and sister's children to his own issue, which would be equally unnatural. 3. It appears from the first part of the devise in favour of the testator's children, that he is not uniform in the use of the word *leave* even with respect to them. He begins with supposing the case of only one son and child; and in this instance he uses the word *have* instead of *leave*, the expression of which will being, *in case I should HAVE one only son and no other child, then I give such only son the whole of my fortune*. 4. Where the testator intended to limit a contingency to the particular time of his own decease, the will shews, that he knew what was the univocal language proper to explain his meaning. Thus on the event of his dying without issue, and in case of his sister Mitford's not having a younger son, the testator gives the one-half of his fortune to William Wicker his sister's eldest son; adding, *if he should be living at the time of my decease*. Again in the clause relating to the guardianship of his children, the testator twice repeats the expression *at the time of my decease*. It is also very observable, that in several parts of the will he couples *leave* with the words *at the time of my decease*; namely, twice in the condition annexed to the annuity to his wife, and once in the clause of guardianship: whence it seems, that the word *leave* in his sense of it does not refer to the time of his decease, and therefore that he added more special words where that was his meaning. 5. The testator has omitted the word *leave* in the executory devise on which the present case arises; for the words are, *in case it shall happen that I should die without issue*. On what ground then can it

it be said that the testator meant to express the same thing, and his words are so wholly different? Surely it is a dangerous construction to imply, that, because in one sort of provision he used the word *leave*, or has expressly referred to the time of *decease*, therefore in another sort of provision, where he changes his language and omits such restrictive words, still his meaning is of the same restrictive kind! The direct contrary seems to be the true construction. In the present case it is particularly so; because it was natural, from the affection of the testator for his issue, whether children, grandchildren, or in whatever degree, that, in describing the event on which his collateral relations were to succeed to his property, he should intend to point to a failure of issue in the largest sense of the words. As too the texture of the will is an evidence, that the testator was not acquainted himself with the nice and profound doctrine of *ex tunc* devises, nor assisted by any professional person possessing such knowledge, it is easy to believe that he was ignorant, there was any thing contrary to law in a devise over on the contingency of a *general* failure of issue. What also confirms this idea is, that, when he comes to give amongst collaterals, he drops the words *sons and daughters*, and in the place of *sons and daughters* drops the more comprehensive word *issue*, devising over on the failure of his *issue*, not on failure of his *sons and daughters*. Should it be forgotten, that, in this difference of language in devises to his own children and in those to his collateral relations, he is quite uniform. As where it was first necessary to introduce provisions to the collateral branches of his family, he uses the words *dying without issue*, which is in the devise to the young sons of his brother and sister; so in a subsequent part, where he takes occasion to let in the elder son of his sister, if he should have no younger son, he uses precisely the same words; and renders this more striking is, that the words *dying without issue* are not used in any other part of the will.

The result of all this being considered is, that the words *dying without issue* not only properly and legally mean a failure of issue *whenever it shall happen*; but the several parts of the will in question seem to operate in favour of this large sense of the words instead of furnishing any grounds for a more restrictive construction. Consequently the appellants think it warrantable to insist, that the only terms on which the words can be restrained are, because the testator intended *more* than the law permits, that his words shall be construed to mean *less* than they import in law or in the testator's apprehension, lest otherwise his intention should be disappointed; which would be a latitude of construction, such as has never yet been professedly adopted by any court of this country.

probably, however, it may be attempted to argue for restraining the words *dying without issue* to the testator's death, that, in devise over to the younger sons of his sister, immediately after these words there follows the word *then*; and it may be said, *then* being an adverb of time, refers to the time of the testator's decease, and therefore that the *failure of issue* should be referred also.

But there is little ground for so construing the word *then*. In itself it most properly refers to the time of the *failure of issue*. In all events, the word is too equivocal and ambiguous to war-rappling it to the time of the testator's decease, without any more; and on this principle Lord Hardwicke in *Beauclerk v. Dormer*, already cited, did accordingly refuse to construe the word *then* in this latter sense, which is therefore a direct authority in point for the appellants.

It may also be said, that the case of *Atkinson and Hutchinson*, P. Wms. 258. is an authority for restraining the words *dying without issue* to a failure of issue *at the time of the testator's death*; because that case was determined by Lord Chancellor Talbot on the word *leave*, in a devise *preceding* the executory devise then in question.

In the case of *Atkinson v. Hutchinson* was as it is abridged in the margin of the Reporter, or as it is stated by Mr. Tracy Atkyns, in a note referring to the report in Peere Williams, there would be some colour for calling it in aid of the respondent. But the contentment of the will in the report itself renders the case wholly inapplicable here. As that case is given in Mr. Atkyns and in the margin of Peere Williams's Reports, it was thus. "A devise of a term to *A.* for life, remainder to the children *A.* shall have at his death, and if the children of *A.* die without issue, then to *B.* The children of *A.* die without leaving any issue living at the time of their deaths;" and on this case Lord Talbot represented to have held the devise over to *B.* good. But the abridged state of the case appears *materially erroneous* from every report, which is professed to be abridged. According to the real facts of the case, Edward Baxter devised a term of years in trust for his wife Sarah, if she so long continued a widow, and after her death or second marriage, to the use of such children as the testator should *leave* at the time of his death, equally amongst them; and in case any of his said children should die *without leaving any issue*, the share of him or her so dying to go to the survivors or survivor of them; and in case all his said children should die without *leaving any issue*, then to the use of John Hutchinson."—It is a great and essential difference between the *abridged* and the *full* state of this case,

case, that in the former the executory devise over to the person in the last limitation is on the contingency, if the children *die without issue*; whereas in the latter, which must be taken to be the true report, it was on the contingency, if the children should *die without LEAVING issue*. Had therefore the executory devise in the present case been on the testator's *dying without LEAVING issue*, the devise, which was the subject of debate in *Atkinson and Hutchinson*, might have resembled it. But the word *leaving*, which was so material *there*, being wanted in this, all comparison between the two cases falls to the ground.

It may be contended for the respondent, that the contingency of the testator's *dying without issue*, in the present case, has a *double ASPECT*, including in it two distinct parts, one a failure of issue by the testator's *never having any*, the other a failure of issue *after issue had*; and that the former part of the contingency which is lawful, and what has really happened, ought to be separated from the latter, in consequence of which the former certainly would be good. Also for this purpose, several authorities may be cited; particularly Higgins and Dowler, in 2 P. Williams, 1 Salk. and 2 Vern. by Lord Cowper; *Stanley v. Liddell*, in 2 P. Wms. by Sir Joseph Jekyll; *Sabbarton v. Sabbarton*; Mr. Forrester's Reports, as decided by the judges to whom Lord Hardwicke referred the case; *Gower v. Grosvenor*, in Barnardiston's Cha. Rep. by lord Hardwicke; and *Pelham v. Gregory*, in 1 P. Wms. by your lordships, after taking the opinion of the judges. If these cases combined, the inference by the counsel for the respondent may be, that they have fully established a difference between an executory devise on a failure of issue after a preceding *vested* estate to the issue of a tenant for life, and an executory devise on such failure of issue after a preceding *contingent* estate to them; and that, if in the latter case the estate's vesting at the birth of a child or children is made to depend on the life of a person *in esse*, and the vesting becomes impossible by the death of that person without ever having had any child, then the executory devise is good. Further, they may urge, that this difference exactly applies to the present case; because here, as the testator had no child living at the time of his will, the estate was given to his children previous to the devises over on his dying without issue was *contingent*, and as he never had any child, the devise to them never vested, nor can vest.

But to the application of such a refinement to the present case, the appellants have various considerations to oppose.

1. In any case such splitting of *one* contingency into *two* (which has little reference to the real intent of a testator. It rejects the simple form in which the testator expresses the contingency,

provides for it another, better adapted indeed to execute the
 will of his will, but unfortunately such as never occurred to
 the testator himself. Probably, therefore, this new modelling
 of its birth to an artificial subtlety, of which the aim might
 obviate, in some degree, the inconvenience from a rule of
 construction, already noticed, and too well established in the
 period of executory devises to be openly subverted; name-
 ly the rule, that, if the contingency be too large, the devise
 be wholly void, instead of being received *partially*, and so
 as it doth not exceed the policy of the law against perpetuities.

If this splitting of one contingency into two is warrantable,
 it is not to be confined to executory devises on failure of is-
 sue after a preceding unvested estate to them, but should op-
 erate universally, whenever an executory devise is made on fail-
 ure of issue of a person *in esse* not having issue at the time of the
 devise; because, in every such case, the contingency is equally
 liable of being so divided, it implying, as well a failure of issue
 as ever having any, as having issue and a failure afterwards.
 The very respectable approvers of this splitting doctrine refuse
 to apply it. Thus in *Beauclerk and Dormer*, 2 Atk. 308.
 Lord Macclesfield made Miss Dormer his sole heir and executrix, but if
 she died without issue, then to go to lord George Beauclerk, lord
 Macclesfield held the devise over wholly void, without regard to
 Dormer's ever having issue or not. It seems, therefore, as
 the principle of the doctrine leads to consequences, which those
 who adopt it feel themselves not at liberty to acquiesce in.

In all the cases before cited, except *Higgins and Dowler*,
 the doctrine was taken on a difference between an executory de-
 vise after what in the case of land would be an *express vested es-
 tate tail*, and an executory devise after what in the case of like
 property would be an *express contingent estate tail*; whereas the
 present case is not of an estate tail of either sort.

In all the cases before mentioned, without excepting one,
 there was a previous estate *for life*, with a remainder in tail; but
 in the present case the first devise is not merely *for life*, the will
 giving to the testator's children an estate in general terms,
 and, if it was not for the controul from the devise over on his
 failure without issue, would have carried an absolute interest in
 the personal property devised.

Lord chancellor Nottingham, to whose liberality of con-
 sideration the present doctrine of executory devises owes so much
 of its establishment, did, in *Burgefs v. Burgefs*, Pollexfen 40,
 adopt this distinction between an executory devise on a
 failure of issue after a *contingent* estate, and an executory devise
 on failure after a *vested* estate.

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6. Lord Talbot decided against the distinction in *Clare* in Mr. Forrester's Reports, and again in *Sabbarton v. Barton* in the same book; and though his opinion was afterwards over-ruled in the latter case by the judges to whom Lord Hardwicke referred it, yet from the terms of their certificate it appears, that they founded themselves, not on the distinction in question, but on the use of the word *leave*, in the executory devise over.

7. Lord Hardwicke, in *Gower v. Grosvenor*, did not absolutely find his opinion on the distinction, but chiefy relied on the special manner of giving the personalty by reference to a strict intail of real estate, the former being devised to *heir-loom*s, as far as they could by law; which qualification of the executory devise left the case without a doubt.

8. In *Pelham v. Gregory*, the devise was of real and personal estate mixed; and therefore the judges, in that case, might apply the qualification expressed by the will in *Gower* and *Grosvenor*.

9thly and lastly, the case of the *Earl of Chatham* against *Dawe* is directly in the teeth of the distinction; and being a declaration of your lordships, grounded on the unanimous opinion of the judges, and subsequent to every other case, ought to prevail. The case of the *Earl of Chatham* and *Mr. Dawe* was in substance this. It was a devise of the dividends of some bank-stock, of the yearly income of some exchequer annuities, and of some freehold and leasehold estates, and of the use of some furniture, to Miss Pynsent during her life, and after her decease the male heirs of her body for ever lawfully begotten, and first of such issue unto William Dawe Tothill for life, with various limitations over. Miss Pynsent died without having had issue, on which it became a question, whether the executory devise to Mr. Dawe Tothill of the leasehold and other personalty, or of the issue male of Miss Pynsent, was good or not; and Mr. Dawe Tothill brought a bill to try this question. The cause was heard in June 1766, before the present master of the rolls, who held the devise to Mr. Dawe Tothill bad, as being on too remote a contingency, and therefore dismissed Mr. Dawe Tothill's bill. In June 1770, the cause was reheard before the lords commissioners of the great seal, who reversed the decree of the master of the rolls. Lord Chatham appealed to your lordships, before which it was heard in April 1771. After hearing of the counsel, the following question was put to the judges on the motion of Lord Chatham, viz. *Whether in the event that has happened the devise to the respondent William Dawe Tothill, of the bank-stock, exchequer orders, leasehold estates, and furniture of the houses, specifically bequeathed, is good and effectual or void?* After a consideration of

Sir Thomas Parker, then lord chief baron of the exchequer, delivered it as the *unanimous* opinion of the judges, that *devise was void*; on which the house reversed the decree of the lords commissioners. What renders this judgment of the house a complete answer to all the cases, which can be cited, to maintain the distinction between an executory devise on failure of issue after a *contingent* estate tail, and an executory devise on such issue after a *vested* one, is the particular manner, in which lord chief baron Parker explained the grounds of the answer of the judges to the question proposed. At the bar great pains were taken on the side of lord Chatham, to make *heirs male of Miss Pynsent's body* words of *limitation*, and on the part of Mr. Tothill to make them words of *purchase*; as if the limitation over to Tothill chiefly turned on a distinction between an executory devise on a *vested* and one on a *contingent* estate tail; and the words *IN THE EVENT THAT HAS HAPPENED*, in the question proposed to the judges, manifestly points at the event of Miss Pynsent's dying without *ever having had issue*, and consequently at such distinction. But it was understood at the time, when the judges conferred on the case, they differed in opinion on the operation of *heirs male of Miss Pynsent's body*; some holding them words of *purchase*, others holding them words of *limitation*; and that in consequence of this it became necessary to consider, whether the case could not be disposed of without deciding which way those words should operate. Accordingly the lord chief baron, in delivering the opinion of the judges, declared it to be their unanimous sense, that the devise over to Mr. Dawe Tothill *on failure of issue male of Miss Pynsent's body* was void, on account of *the indefinite failure of issue*, to which those words referred. He added, by way of explanation, that on the one hand, if *heirs male of Miss Pynsent's body* were construed words of *limitation*, the devise was void, because it was after a *vested* estate tail; and that on the other hand, if *heirs male of her body* were words of *purchase*, the devise over was void, because it was on an *indefinite failure of issue*. Left too little should be any doubt of the grounds on which the judges pronounced the devise over to Mr. Dawe Tothill, the lord chief baron particularly cited the before-mentioned case of *Clare and Talbot*, in which a term was devised to *A.* for life, and after his death to his *issue male*, and when that should be extinct to *B.*; that lord Talbot in that case held, *first*, that *issue male* were words of *purchase*, and *A.* took only for life; and *secondly*, that the donor had devised over on a general failure of issue male of the devise was void, *notwithstanding the accident of A's dying without having had issue male*. Taking into consideration these

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particulars which attended the case of the earl of Chatham. Mr. Dawe Tothill, I submit to your lordships, that, as *Clare* was determined by lord Talbot in the most direct tradition of the distinction between an executory devise and a general failure of issue, where it follows a *contingent* estate, where it follows a *vested* one; so the lords, in the *earl of Chatham* and *Dawe*, have equally rejected that distinction, and frequently have subverted all the cases which clash with *Clare* and *Clare*, and are in favour of it. On this ground, therefore, I submit to your lordships, that the distinction; however formerly by authority it might once be, however cogent the reason which it proceeded, is now expired, and cannot be applied either to the present or any other case.

There is one other remark, which strikes me as likely to be made for the respondent, on thus attempting to condemn executory devises over in the present case *on the testator's will without issue*. It is, that though the testator, whose will is in question, has been now dead above thirty years; that though there have been two cases in chancery to settle the construction, and though the present cause was twice heard before the present lord chancellor, yet the validity of the devise under which the respondent claims, was never before so much called in question.

In answering this observation, if it should be made, the appellants cannot deny the facts it represents. I will also admit to be singular, that if the point is maintainable, it should have escaped the attention of the appellants and those concerned in the case. Further, I concede that as the point is started at a very late stage of the cause, it behoves your lordships to be jealous of entertaining the point, and this may render it more difficult to convince your lordships, that it has strength enough to warrant a decision for the appellants. But notwithstanding, if, on an examination of the terms of the will, it appears that the point doth fairly arise, and that the appellants are not precluded by any concession they have made in the proceedings, I presume, that in point of form the question is still open for discussion, and that a decision upon it cannot be decided. If, too, the arguments on which the invalidity of the executory devise in question is now urged to your lordships, should, after considering them, be found too strong to be repelled, the weakness of their appearance cannot operate as a bar to their weight and influence on the judgment of your lordships. Indeed, on the one hand, this lateness gives the respondent the great advantage of a *first* prejudice against the point. But then, on the other hand, it removes for the appellants, that, which, on subsequent points of the case, they feel to be their greatest advantage.

entage; namely, the more formidable and permanent pressure from the higher authority of the adjudication which gives sanction to the present appeal; for the objection to the continuance of the executory devises now controverted never having been argued or spoken to in any respect before the court below, is no part of the case on which the judge of that court pronounced his opinion, and consequently it comes before yourships unaffected and untouched by the grounds of the decree appealed from.

SECOND QUESTION:

The argument on this question lies in a narrower compass than that on the former. It arises from the particular manner in which the testator has expressed the devises subsequent to the devise to the *younger sons of his brother and sister*. Had the latter been unexplained and uncontrouled by the other parts of the will, there might be no room for such a question. But there are other passages in the will, from which the appellants collect, that the testator did not mean that the devise to the second or younger sons of his brother and sister should take effect, unless if they had such issue as falls within that description.

The first of these passages immediately follows the devise to the younger sons; the words being, *if my said sister AND brother should have any such second or younger son, then, and in such case, I give and bequeath my said fortune or substance to my said brother WICKER and sister Mitford, equally to be divided between them, and share alike, and to their respective executors and administrators*. Now the appellants apprehend, that this devise according to strict construction, is so expressed as to shew, unless *both* the brother and sister had a second or younger son *the parents themselves*, and not their children, were to take. Strict construction is certainly with this idea; for the brother and sister are named not in the *disjunctive* but *conjunctively*, and *AND* being interposed instead of *OR*. If the word *both* were added, and the contingency had been *if my sister and brother should have any such younger son*, it could not be said, but that the testator intended that if *either* should not have a second or younger son, the preceding devise to younger sons should not take effect in any respect. And though, from the want of that expression, the construction contended for is not quite so strong; yet the word *AND* by itself operates conjunctively as well as disjunctively. It should be understood accordingly, unless from some part of the will it can be shewn, that the testator meant to depart from the *disjunctive*:

The second passage, which the appellants rely upon, is frequent part of the will; where the testator has thought fit to introduce a special provision for the event of his sister's not having a younger son. The words are, *in case I shall dye without issue and my sister Sarah Mitford shall not have any second or younger son born of her body, then and in such case I do give and bequeath one half of my fortune or substance to Wm. Mitford, eldest son of my said sister Mitford, if he shall be living at the time of my decease; but in case of his death and of the death of my said sister before me, then and in such case I give the whole thereof unto my said brother Wicker and his executors or administrators.* Here the testator gives his own interpretation of the former part of his will: for he seems to have recollected, that under that part of his sister's not having a younger son would carry his property in moiety to his brother and sister; but on further consideration he appears to have changed his mind in respect of moiety. Instead of giving a moiety to his sister, as he then had done, by the previous devise to his sister and brother their respective executors on the event of there not being younger sons of both, he makes a new arrangement of this matter. *First*, he gives it to his sister's eldest son, who was then living; and *secondly*, if both he and his mother should die before the testator, then he gives it to his brother; and as he concludes that in the event of his sister's not having a younger son, his devise to the younger sons of his brother was not to operate, that his brother by the former part of the will would in that event be entitled to one moiety, the testator expressed his intent in favour of his brother, not simply by adding the moiety to his own moiety, but by declaring that in the event described he should have the *whole*. This was the same intent as if he had thus expressed himself.—“By the previous devise to my brother and sister and their respective executors or administrators, my brother will be entitled to a moiety of the property, if there is not a younger son of my sister, or if there is not a younger son of my brother; and my sister will be entitled to the other moiety. But on reconsidering my first plan of distribution, I chuse to make an alteration in respect to one moiety; and my will is, that if my sister should have a younger son, the moiety she would be entitled to by my first idea shall not go to her absolutely, but it shall go to her or others according to certain events, *viz.* if her son survives me, it shall go to him, if he dies before me and my son survives me, it shall go to her; but if I survive both, it shall go to my brother; and as I have already given one moiety to him in the event of there not being a younger son of his

sister, the whole in his hands.”
 “on this view of the whole.”
 “single consideration which the testator intended to the younger sons of his sister.”
 “There is no doubt that the testator tends to convey the property to other persons, confirming the provision for a younger son.”
 “The testator shall not have the whole, on the testator's not take in the word on import of his office contrary to what may be observed of his sister's younger son's disappearance of such a manner. But if the testator is to be intended of his property, however they it, and effect.—But intended for said of it.”
 “two brothers the parent's description of the testator's anxiety to convey the property to his son then neither from my part.”

...sister, the accession of this other moiety will centre the whole in him, and accordingly my will is that he shall have the whole."

On this view of the second question, it resolves itself into a single consideration.—The strict construction of the words, which the testator devises his property in the first part of his will to the younger sons of his sister and brother, excludes the younger sons of *both*, unless *both* have children of that description. There is not a syllable in any other part of his will which tends to contradict this construction. On the contrary, every other part which throws any light on the testator's intention, confirms it; the latter part of the will containing an express provision, that if his sister shall not have a younger son, her younger son of his brother shall not have any estate whatever. The testator having then expressly declared, that if his sister shall not have a younger son, the younger son of the brother shall not take; how natural was it, that the testator should mean, on the other hand, that the younger son of his sister shall not take if his brother should not also have a younger son? The words of the former part of the will do in strict construction import such a meaning, on what ground can your lordship whose office it is to interpret the will, impute to the testator a contrary intention?

It may be objected, that this construction attributes to the testator a strange and improbable meaning; for why should the younger son of his sister's not having a younger son disappoint his brother's younger sons, or *vice versa* the brother's not having a younger son disappoint the younger sons of the sister?

But such a meaning is *particular*, it is not requisite for me to infer it. But if such an intent is expressed, or by fair construction is to be inferred from the will, it must prevail. Every intention of a testator, however odd, however unaccountable, however harsh or unnatural, if his words are sufficient to convey it, and it is not contrary to law, is entitled to have effect.—Besides, in the present case such an intent as is intended for, though it be particular, yet that is all which is said of it. All it amounts to is giving to the younger sons of two brothers or sisters, if *both* should have younger sons, the *parents themselves if only one* should have children of that description; and it may be accounted for by the equality of the testator's affection for his brother and sister, and a consequential anxiety to put them both on the same footing. It was said, "If my brother and sister shall *both* have younger sons, then neither shall have any *personal* and *immediate* benefit from my property, but it shall go amongst their younger sons;

“ sons ; if neither shall have such children, it shall go in
 “ ties between *themselves* ; and if *only one* shall have
 “ child, it shall also go to them, in order that where one
 “ benefit *personally*, the other may have it in the same
 Add to this manner of understanding the first part of the
 where the testator's favour seems equally divided between his
 ther and sister, that, on a further consideration, either be-
 his sister was a married woman, and therefore not so fit to
 an absolute property, or for some other reason beyond the
 of probable conjecture, the testator resolved in some degree
 deviate from his first plan of perfect equality between his brother
 and sister, and instead thereof to admit his sister's eldest son
 his own brother successively to a chance of the moiety
 under the former bequest would have gone to her ; and with
 addition I submit, that the testator's intent will appear per-
 clear, intelligible, and consistent. But should this plain
 construing the will be rejected, it is conceived on the part of
 the appellants, that the import of the words of the testator
 not only be deviated from, but his intention will appear ob-
 confused, and unaccountable.

The respondent's counsel may insist, that this way of
 struing the will was not pressed at either of the hearings before
 the lord chancellor ; and that if it should prevail, it will en-
 tirely benefit the respondent *wholly* ; because at the same time it gives
 moiety of the property to the appellants, it will carry the
 moiety to the personal representatives of his mother Sarah
 Ford, who are not parties to the cause.

To this objection I offer the following answer.—I confess
 the absolute exclusion of the respondent by there being a
 younger son of the testator's sister only was not pressed before the
 lord chancellor below ; the turn and stress of the arguments there being
 on the point, whether the respondent as a younger son should have the
whole or a *moiety*. But this will only shew, that, in consequence
 of the further study of a will confessedly nor without great
 difficulty in the construction, the case has appeared in rather
 a different light. Yet if the construction now contended for should
 appear most conformable to the real intention of the testator,
 I apprehend, that the appellants come in time to have the
 advantage of it. Nor in contending for this construction, is there
 any surprize on the counsel for the respondent ; for as the
 point of argument is avowed in the reasons in the printed case
 of the appellants, the counsel for the respondent will have the
 opportunity of contesting the point. The only difference that
 taking up the point can make is, that the parties will in the

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ance and together have the judgment of the appellant court, including that of the judge of the court appealed from, instead of first having the judgment of the lord chancellor singly, and afterwards that of your lordships; a difference, which, though thought to be avoided, where it is possible, yet, I presume, is such, as ought to estop any party from availing himself of a course of argument.

THIRD QUESTION.

This third and last question is the only one, which was the subject of debate on the two hearings before the lord chancellor, consequently the only one, on which his lordship gave his opinion.

In few words, this question is, whether the younger sons of the testator's brother and sister were intended to take *per stirpes* or *per capita*.—If the former construction prevails, it is conceded, that it will carry one moiety of the disputed property to the respondent and the other to the appellant Mrs. Wicker.—The latter is adopted, it gives the *whole* to the respondent.

The words of the devise to the younger sons of testator's brother and sister, on which the respondent founds his claim to the whole of the property, is thus expressed:—*In case it shall happen that I should die without issue, then I do give and bequeath the whole of my fortune or substance EQUALLY TO BE DIVIDED BETWEEN any second or younger sons of my brother John Wicker and sister Sarah wife of William Mitford, Esq; by him or any husband she may hereafter happen to intermarry with.*

The respondent contends, that by this devise it was the intention of the testator to distribute his property amongst the younger sons of his brother and sister indiscriminately, without regarding whether such younger sons were of his brother or sister, or the number from each; and that if there should be a younger son of his brother or his sister *only*, such younger son should take the *whole*; and consequently, that as the testator's brother died without having any son, and his sister died without any younger son besides the respondent, the whole belongs to him.

For this division *per capita*, it may be said, that the words of the devise in their strict and proper sense import it:—and that the construction given in various cases to the words of the statute distributing the personal property of an intestate equally divided amongst his next of kin, is an authority for such a division; the rule upon that statute being, that all the next of kin claim *jure suo* and not *jure repræsentationis*; the division is ever *per capita*, which is exactly the present

sent case :—and further, that there are some cases, independent of the statute of distributions, in which a distribution *per capita* in legacies similar to the devise or legacy in the present case has been preferred.

But I beg leave to controvert the propriety of thus construing the devise to the younger sons of the testator's brother and sister, and to contend for a division of the property amongst the younger sons of the brother and sister *per stirpes*; that is, for giving one moiety to the younger son or sons of the brother, and another moiety to the younger son or sons of the sister: and I submit to your lordships the following general propositions in favour of the latter construction:

(1.) That according to strict construction the devise to the younger sons of the testator's brother and sister, considered itself, will operate for a division *per stirpes*.

(2.) That there are other parts of the will, some connected with the devise in question, others independent of it, which strongly enforce the construction *per stirpes*.

(3.) That if the intention of the testator is doubtful, the construction for a distribution *per stirpes* ought to be preferred.

(4.) That neither the cases on the statute of distributions, nor the other authorities alluded to, are applicable to the present case.

(I.)

The appellants do not allow, that the strict sense of the devise to the younger sons of the testator's brother and sister is a division *per capita*; for they conceive, that the strict sense is rather for a distribution *per stirpes*. The words *equally to be divided*, it is observable, immediately precede the word BETWEEN; and this latter word being derived from the word *equally*, the words *equally to be divided* BETWEEN do together, in grammatical strictness, mean a division applicable to that number of persons. The word AMONGST being a more proper word for a division applicable to a greater number. If, too, the words *equally to be divided* BETWEEN refer to a *bi-partite* division, they certainly point at a division *per stirpes*, namely, the stock of the brother on the one part, the stock of the sister on the other. To this may not be amiss to add, that as brother and sister cannot make the devise to the younger sons of the testator's brother and sister should be understood as *separately and distinguishably*, as if the devise had been to the *younger sons of the brother*, and the *younger sons of the sister*; and this also leads to a distribution *per stirpes*.

(2.)

such a rigid and technical construction is what the appellants rely on; and I chiefly state it for the sake of repelling argument of strict construction, which is likely to come from their side.

There are several previous and subsequent passages of the will, which tend to shew, that, by the devise to the younger sons of brother and sister, the testator intended a division *per stirpes*. It is observable, that in several parts of the will, where the testator gives the *whole* of his fortune to one person, he has specially provided for such person's taking the whole in the express terms. Thus he puts the case of his having *only one* son, and expressly gives to such son the *whole*. So also he expresses himself in the event of his having *only one daughter*. But in the devise to the younger sons of his brother and sister, he supposes the case of one devisee, and confines his expression to a case, in which division would *at all events* be necessary. This exactly squares with the idea of a division *per stirpes*; because if the devise to the younger sons of his brother and sister is understood as giving one moiety to the brother's younger sons, and the other to the sister's; then, notwithstanding the case of a younger son either of his brother only or of his sister only, a younger son could not take more than a moiety, and consequently the other moiety would go to a different person, that is, either to some person named in the subsequent devise over, or to the brother as residuary legatee.

A slight inference may also arise for the appellants; because in some other parts of the will where a division *per capita* is intended, the testator is not content with directing his children to be *equally divided*, but adds *share and share alike*. These are not the passages of the will from which the appellants ask for much aid.

These passages, which I principally rely upon as an explanation of the devise to the younger sons of testator's brother and sister, are evidence that the testator thereby meant a division *per stirpes*. These are the devise over to the testator's brother and sister, and the subsequent modification of it by the special provision for the case of the sister's not having a younger son. These have been already stated and discussed in considering the second clause; but they require being again reasoned upon, though the purpose here is different. *There* they were referred to, for the sake of shewing, that the testator did not intend that the devise

devise to his brother's and sister's younger sons should operate except in the event of *both* having such sons. Here they are appealed to, in order to prove, that if that devise is to operate in the event which has happened, namely, that of there being a younger son of *one only*, it must operate *per stirpes*, and consequently give only a moiety of the testator's property to the respondent.

In the devise over on the contingency, *if testator's sister or brother should not have any second or younger son*, he gives his share to his brother and sister *equally to be divided between them share and share alike, and to their respective executors and administrators*. From this passage I beg leave to insist, that a strong inference arises in favour of applying a division *per stirpes* to the immediately preceding devise. The words *equally to be divided* and *share and share alike*, in this clause strongly mark the equality of the testator's affection between his brother and sister, and as they divide the property into equal moieties between brother and sister *personally*, so they lead the mind to suppose that a like distribution into moieties was in his mind, when in the preceding clause he gives a preference to their *unborn* younger sons. That the testator intended that the two *parents* should take in moieties, will not admit of a denial. How natural is it to suppose, that the same testator, who in his bequest looked thus impartially and equally to the parents themselves, should mean the same equality between their issue, when the words used in this respect are capable of being so understood. But this reasoning acquires great additional force, when we consider, that, in the devise to the *executors and administrators* of the brother and sister, the word *respective* is so emphatically introduced. The effect of the word *respective* is no less than, in the event supposed, it divides the testator's property into two moieties, giving one to the brother's personal representatives, and the other to the sister's; and consequently in case of the testator dying *intestate*, the will operates as a distribution *per stirpes*, carrying one moiety to the *children or stock* of the former, and the other to the *children or stock* of the latter. Thus it is plain that as between *all the issue* of the brother and sister, and their *younger sons*, the testator plainly intended, and has undoubtedly created, a division *per stirpes*. How strange then will it be to presume, that he should have an intention in respect to the *younger sons* of the brother and sister different from that apparent in respect to their other issue! The argument from all this pressed in few words, stands thus.—The testator has confessedly declared a division *per stirpes* as between the brother and sister themselves, as between their *executors*, as between their *administrators*, and consequently as between their *elder sons*, and

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between their *daughters* whether elder or younger; and this I take to your lordships as a solid ground for presuming a like intention in respect to the *second* and *younger sons* of the brother's sister, till some words can be found manifestly and unambiguously importing the contrary.

The subsequent devise over to the elder son of the testator's sister comes still nearer home to the point I insist upon. In the testator himself supposes the case of his sister's not having a second or younger son, for which event he thus provides. The words are, "*Provided always, and my will and meaning is, notwithstanding any thing herein contained, in case I shall die without issue, and my sister Mitford shall not have any second or younger son born of her body; then and in such case I do give and bequeath THE ONE HALF of my fortune or substance to William Mitford, eldest son of my said sister Mitford, if he shall be living at the time of my decease; but in case of his death, and of the death of my said sister before me, then and in such case I give THE WHOLE THEREOF unto my said brother Wicker and his executors and administrators.*" The first remarkable thing in this devise is the word *THE* before the words *one half*. *THE* is a word of reference, and here it is significantly used as such by the testator. To something it must refer, and that something can only be *what* the testator supposes to have been given by the previous part of his will to his sister's younger sons. The course of the event shews, that such must have been his meaning; for in this part of the will he professes to give to his sister's son what he had before given to her *younger sons*, and to substitute the former a *substitute* for the latter. This part of the will, therefore, is a key to the former part: It in effect is the same as if he had expressed, in direct terms, that *the moiety* given by the previous part of the will to his sister's younger sons should, in case of her not having such, go to her eldest son; which makes the intention to divide *per stripes* in the devise, on the respondent builds his claim, quite apparent; for then not only the sister's younger son or sons could not have more than a moiety. Here the argument may be reduced to a syllogism.—The elder son of testator's sister was a substitute for, and could take all that could be taken by her younger son. But the younger son could only have taken a moiety. Therefore the elder cannot take more.—So much for the *manner* of devising *THE* moiety to the sister's eldest son. But tho' the words *half-part* should not be deemed words of reference, still the mere giving a moiety to the eldest son of testator's sister in the event described furnishes the strongest arguments against a division *per capita*. It puts an absolute negative on dividing *per capita*, in case of the sister's not having a younger son.

Why

Why then should the will be construed to mean such a division in the case of the brother's not having a younger son? Should be presumed, that the testator intended to divide *per capita* in favour of the sister's younger sons, but not in favour of the brother's younger sons? At the time of the will neither brother nor sister had a younger son. Therefore no *predilection* for the younger children of either can be attributed to the testator. Yet it will be difficult to impute such a partial distribution of the will on any other ground. If any partiality can be supposed in the case, it must be by reference to the persons of the testator's brother and sister. But then, unfortunately for the respondent, the argument of partiality must operate for the appellant's; because, as far as the will avows any thing like partiality, it is in favour of the brother, not against him. In him the testator reposes his *whole confidence*, making him *trustee* of the real estate, *executor* of the personality, and *guardian* of the testator's own children. Him the testator makes *residuary devisee and legatee*, thereby giving him every interest undisposed of of both kinds of property. In such a case to infer from doubtful words, that the testator intended a distribution *per stirpes* for the advantage of the sister's family, without having a like intention in respect of the brother's, would be to reverse the partiality avowed by the testator for his brother, and to divert the course of it wholly in favour of the sister. Such a construction seems manifestly injurious to the brother. It would be establishing a division *per stirpes* in favour of one side only. If the will would bear the construction of such a division for both the brother's and sister's younger sons, it would at least be free from the objection of injurious partiality; because then it would give both branches an equal benefit of the contingency of the brother and sister having most younger sons; for, as a learned civilian justly observes, *ubi fortuiti casus (a), par in utramque partem ratione neuter lædi videtur*. But allowing a division *per stirpes* for the sister's sons, and denying it to the brother's, would be grossly partial; and not only so, but to the family of the person favoured by the will, and against the family of the person unfavoured.

It may indeed be argued, that the devise over on the contingency of the sister's not having a younger son could not be introduced for any purpose, unless it was to establish a partial division *per stirpes* in favour of the sister's elder son, and so to vary the devise to the younger sons of the brother and sister. But in fact there is a very different and most obvious reason for this addition to the will, as I have before observed, in argu-

(a) Vinn, in Inst, lib, 3, tit. 5.

(a) Puffendorf
(b) Seld, d

second question of the cause. It was not the aim of the testator to change the distribution before appointed amongst the younger sons of his sister and brother, by substituting a partial division *per stirpes*; for the former devise will well bear the construction of having established such a distribution equally in favour both of his sister's younger sons and his brother's. But it is apparently his intent to alter the devise over to his brother's sister on default of younger sons, so far as related to the moiety; and to do this, by letting in her eldest son and actually his brother to her moiety, instead of leaving it to her wholly.

(3.)

Should the words of the will material to the present question be construed of doubtful construction, I humbly conceive, that there are various grounds for adopting the construction, which is adverse to a distribution *per capita*, and consequently adverse to the defendant.

There is an equity in the division *per stirpes*, which renders it more conformable to the natural stream of justice than the division *per capita*; and it is on this principle, that the writers on the law of nature recommend it in the case of successions. Puffendorf states the principle of the succession *per stirpes* with great ability, strongly observing in favour of children who lose their parents, "that it would indeed be a lamentable misfortune, if, besides the untimely loss of their fathers, they should further be deprived of those possessions, which either by the rule of law or the design of their progenitors had given to their parents just hopes of enjoying (a)".

Accordingly the succession *per stirpes* has been preferred by all the wisest and most polished nations.—The *jus representationis*, of which succession *per stirpes* is a consequence, was universally admitted by the Jewish law, both amongst lineal and collateral heirs; for, as Mr. Selden in his book on successions amongst the Hebrews, latinizes a passage from the Talmud, *est universitas, ubi quis in successione est præferendus et ipse, etiam si ejus egressa est itidem præferenda* (b).—It is also undeniable that the Roman law was equally favourable to the succession *per stirpes* and the *jus representationis* so far as regarded lineal heirs for such lineal heirs, however remote, took by representation *in infinitum*, and the succession *per stirpes* prevailed universally as well where some of the heirs claimed *jure proprio* and others *jure representationis*, as where all claimed in the latter way. This was clearly the Roman law as regulated by the 118th novel of emperor Justinian. But there was some difference in re-

(a) Puffendorf, Law of Nature and Nations, b. 4. c. 11. §. 12.

(b) Seld., de success. ad leg. Hebræor. cap. 1.

spect to *collaterals*. The novel expressly provided, that the children of deceased brothers and sisters should come in those which were living; and that in such a case the distribution should be *per stirpes*. But it excluded from the benefit of representation all collaterals beyond brother's and sister's children, and directed a division *per capita* according to mere proximity of blood in all the remoter degrees. Hence grew a famous controversy amongst the commentators upon the Roman law concerning which in some countries of Europe they are still divided in opinion at this day. The point is, what sort of division the emperor intended, where *only* the children of the brothers and sisters are the heirs; some in the case proposed hold for a distribution *per capita*, others for a distribution *per stirpes* (*a*). Voet in his commentary on the Pandect is unhesitating for the former distribution. Vinnius, who enters into the controversy more fully, states the reasons and authorities on each side in two different pieces; first, in his commentary upon the *Institutiones*; and secondly, in his *Selectæ Juris Quæstiones*. It is remarkable, that in both works, though Vinnius begins with declaring his own opinion to be for the division *per capita*, yet he concludes with wavering, and with a doubt, whether the construction of the novel be altogether according to the sense and intention of Justinian, without adding some limitation to the doctrine at first adopted (*b*). One great argument for

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(*a*) The controversy on the point here mentioned is of very ancient date, traceable into some of the earliest glosses on the text of the Roman law. Accursius takes the lead amongst the doctors who decide for the succession *per capita* in the case supposed; and he died in the year 1200. His scholar Accursius is the most of those, who insist on the construction *per stirpes*. The dissention originating was of long duration. Which is the better of the two opinions, was perfectly settled in the beginning of the 17th century; though some years before the accomplished Cujacius had declared for Azo without any seeming hesitation (Cujac. in lib. 2. de feud. tit. 11.) Hence, as I presume, it was, that Cujacius, in his book *de tacitis et ambiguis conventionibus*, the dedication of which pope Paul the Fifth is dated by its author in 1609, thought it necessary to state largely the reasoning and authorities on each side of the controversy. Notwithstanding also that this learned cardinal upon the whole appears to have preferred Azo's opinion, yet he confesses the extreme difficulty of the point; noticing that Tiraquellus had described it as more obscure than Cimmerian darkness, and observing that Baldus and other distinguished commentators had been unsteady in their sentiments upon the question. (Mant. de tac. et amb. convent. lib. 23. c. 32.) Other writers on the civil and feudal laws subsequent to Cujacius, who make a copious display of the authorities on this litigated topic, are Schœnker, a German lawyer in his feudal disputations published in 1697, and Deland, a French lawyer in his large work *de successione testati ac intestati* which came out in 1693. (Schœnker, lib. 1. disp. 6. f. 74. De Barry lib. 18. t. 3.) To the latter authors, both of whom readily subscribed to the opinion for dividing *per capita* where the succession falls upon nephews and nieces only, should be added Vinnius in his commentary upon the *Institutiones* and in his *Selectæ Juris Quæstiones*.

(*b*) The limitation is, that the opinion for dividing *per capita* should hold only where *fratrum filii ex propria personâ veniunt, non autem quando vocantur ad*

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tribution *per capita* is, that the ancient law was for it, and the emperor in his novel only introduced the *jus representatio-* in favour of a deceased brother's and sister's children, to pre- exclusion of them where the intestate left a brother or sister ving; and that he doth not admit them *per stirpes* in any case. But when, on the other hand, it is considered, the only part of the chapter relative to collaterals in the novel, which expressly professes to direct a distribution *per capita*, merely commands it for the degrees beyond brother's sister's children, a candid and impartial person must allow, there is room for doubt. However it should not be con- d, that in England the prevailing opinion amongst our civi- has been in favour of those, who interpret the novel, not tend a succession *per stirpes* amongst collaterals where all heirs claim *juro suo*. At least the like construction, which been applied to our statute of distribution, as I shall here- more particularly notice, with the manner in which that ruption is defended, imports as much. But still, with exception of *collaterals all* claiming without aid from the of representation, it is certain, that the Roman law, as re- ed by the emperor Justinian, preferred the succession *per* ; and that it has been followed in that preference by the of some of the principal states now existing in Europe.

qui aliâs aut cum iis concurrent aut eos ipsos excluderent. This accords with doctrine as explained and improved by the more enlightened comment of us: and I take it to be the doctrine by which collateral succession both to and allodial property has been for the last century most generally regulated the greatest part of the continent of Europe. However, it should be re- red, that the descent of *real* estate in England has been immemorially fixed in nity to Accursius's rule of succeeding *per stirpes*, not only as amongst the of brothers and sisters, but as amongst collaterals generally in the same ed extent as amongst lineal heirs. It is also proper to recollect in reading jurists on this subject, that it should ever be discriminated, whether they with a view to feudal or allodial property; and that the like attention should wn in respect to moveables and immoveables. The distinction between and personalty in England is peculiar to ourselves. As to the Roman law sions, it embraced property of every kind without a difference: and in most of the states of Europe the rule of succession varies much accord- to certain prevailing classifications of property; yet throughout a tincture of man law of succession, more especially as it was newly modified by the novel of Justinian, will most probably be discoverable by a nice observer. er, therefore, wishes to investigate historically the progress of the law of suc- either in England or in any other country of Europe, should never lose that famous imperial novel. The French lawyers in general write as if nvinced of the utility of thus keeping in mind Justinian's constitution; for, ng on this branch of jurisprudence, they continually refer to the novel as ing their whole system of the law of inheritance. Yet that system is re- y diversified by an infinitude of various customs; not only almost every having some peculiarity, but even far smaller districts being so distin- See Domat's Civil Law, and a treatise on successions according to the *Juris Regum*, which within these few years has been published amongst the post- works of Monf, Pothier,

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The common law of England favours the construction *per stirpes*, in preference to the division *per capita*. It is then a canon or fixed rule in the descent of land, that there shall only be a succession *per stirpes*, but that this succession shall prevail universally and *in infinitum* amongst collateral heirs, as well as lineal. Thus, if there be two sisters, and one of them dies leaving four daughters, and then the father of the two dies without male issue, the surviving sister shall inherit one moiety of the father's land, and the other moiety shall be divisible into four parts amongst the four daughters of the deceased sister. In this case thus supposed one descendant takes *jure* and the rest *jure representationis*. But the rule is the same where all the claimants take in the latter way; for if the two sisters, and one dies leaving one daughter, and the other dies leaving four daughters, and then the father of the two dies, one moiety of his land descends on the daughter of the sister having only one daughter, and the four daughters of the other sister take only one moiety between them.

The division *per stirpes* best suits the language of the particular will now in question. It appears from the will, that the testator's brother possessed at least as much of his affection for his sister. The distinction in favour of the brother, by the will, making him not only sole guardian of the testator's children, but sole trustee of his estate, but also residuary devisee and legatee, would even warrant insisting, that the testator's affection for his brother preponderated. But a succession *per capita*, should prevail, must operate with the greatest partiality for the children; for it will carry the whole of the testator's fortune to his children in the most perfect exclusion of the brother's; whereas the distribution contended for by the appellants, as the one intended by the testator, will distribute the property in equal shares between the two branches of the family.

But weighty as all these considerations are, the only advantage the appellants claim to have from them is, that, if the intent of the will in question be ambiguous, they may be received as a ground for turning the balance in favour of a distribution *per stirpes*.

(4.)

The appellants conceive that there are not any determining cases, which go far enough against a distribution *per stirpes* to reach in any respect the will now in debate.

The authorities for a division *per capita* are of two kinds: first, cases on the statute of distribution; secondly, cases independent of it.

The parts of the statute of distribution (*a*) material to the point of division now to be considered are Sections 5, 6, and 7.

(*a*) 22 & 23 Ch. 2, ch. 10.

fifth Section gives one-third "to the wife of the intestate,
 and all the residue by equal portions to and amongst the chil-
 dren of such persons dying intestate, and *such persons as legally*
represent such children, in case the said children be then dead." The
 sixth Section directs, "that in case there be no children
 or any legal representatives of them, then one moiety of the
 estate to be allotted to the wife of the intestate, the residue
 of the said estate to be distributed equally to *every of the next*
of kindred of the intestate who are in equal degree, and those who
legally represent them." The seventh Section provides, "that
 there shall be no representation admitted amongst collaterals
 other than brother's and sister's children; and in case there be no
 such children, then all the said estate to be distributed equally to and
 amongst the children; and in case there be no child, then to
 the next of kindred in equal degree of or unto the intestate,
 and their legal representatives as aforesaid, and in no other
 manner whatsoever."—As to the cases on this statute, they
 fully prove it to be a settled construction of it, that where
 the next of kin of the intestate are collaterals, a distinction is to
 be made; and that where some are next of kin *in their own per-*
son and some only *jure representationis*, the distribution is to be
per capita; but that where all are next of kin in their own per-
 son, though they make out their pedigree through *different*
 lines, the distribution must be *per capita*. Therefore if the next
 of kin consist of a brother and three children of a deceased sister,
 the brother takes one moiety of the intestate's personal estate,
 and the other moiety is divisible in equal parts amongst the sis-
 ter's three children; and on the other hand, if the next of kin
 consist of three children of a brother and three of a sister, the property is
 to be divided equally amongst the five. This distinction is said to
 have been agreed in *Clarkson and Spateman* before the Delegates
 in 1578, which case is cited in Bunbury's Reports 157. It was
 also adopted by lord chancellor Somers in the case of *Walsh*
and Walsh, which was heard in 1695, and is reported in Prec.
 54. and Eq. Cas. Abr. 249. There is also a series of
 recent cases, which have been determined in conformity to
 this distinction; namely, *Wall and Needham* in the exchequer
 June 1711, cited in Bunbury 158; *Fanson and Bury* by the
 lord chancellor Hill. 1723, in Bunb. 158; *Durant and Prest-*
on by lord chancellor Hardwicke 30th June 1738, in 1 Atk.
 455; *Stanley and Stanley* before lord Hardwicke 4th May 1739,
 in 1 Atk. 455; *Page and Book* at the Rolls 24th June 1742,
 and stated in 2 Ves. 214; and *Lloyd and Tench* 6th March
 at the Rolls, in 2 Ves. 213.—With so many respectable au-
 thorities for the division *per capita* in the case proposed, it would
 be to deny the doctrine so far as it goes. At the same time
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it may not be improper to observe, that it admits of a construction whether such a construction of the statute of distribution was originally a violence to the intention of those who framed it. Why I make this conjecture, will presently appear.

It is well known, how much connected the statute of distributions is with both the civilians and their law. The ecclesiastical judges attempted, by suits in their courts, and by taking from administrators, to enforce a distribution of the personal estates of intestates amongst their next of kin; and the distribution they followed was borrowed from the Roman law, as related by the constitutions of the emperor Justinian. But they were interrupted by prohibitions from the temporal judges. This drove the civilians into parliament for redress; and they originated the statute of distributions. Sir Thomas Roper, 498. The reasons in favour of the statute were framed by an eminent civilian and statesman Sir Leoline Jenkins, and may be seen in his works. It is an anecdote from lord chief justice Holt, that the statute itself was drawn by Sir Walter Williams, another civilian. 1 P. Wms. 27. The great outline of the statute is apparently borrowed from the 118th novel of Justinian. Such therefore being the origin of the statute; and it being considered, that our civilians had adopted that side of the controversy, about the 118th novel of Justinian, which rejected division *per stirpes* amongst collaterals where all claimed, it is not surprising that they should encourage a like interpretation of the statute of distributions; or that our courts of equity should follow them on a subject, which before that statute they had the sole conscience of, and to a judgment of which, they were founded on their own law concerning successions, they will be deemed most competent.—But notwithstanding this peculiar respect and deference fit to be shewn to the learned men of the civil law on such a point, yet it seems questionable whether the influence of their authority has not been the cause of a misconstruction of the statute of distribution. From the account before given of the controversy on the novel of Justinian it appears, that there is room for doubting, whether it was intended by that novel to disallow of a distribution *per stirpes* where nephews and nieces, deriving through different stocks, were the only heirs. But there were still more cogent reasons for not giving such a construction to our statute of distributions. The novel, though ambiguously expressed as to collaterals deriving through different stocks, was so explicit as to descend that even our civilians admit, that amongst the latter the distribution *per stirpes* was universal, and without any exception.

* See Dr. Harris's notes on the 118th novel, chap. 1, at the end of Justinian's Institutions.

statute of distribution contains the same words of providing for distributing amongst descendants and amongst collaterals with this difference only, that in case of collaterals the right of representation is limited to brothers and sisters children; and in the first place, where collaterals are named, *every* is added to the description. From this observation, a curious question arises; for unless the word *every* shall be considered as a mark of distinction, which hitherto has not been attempted, the statute has been misconstrued, or there is no such law, as a distribution *per stirpes*, any more as to descendants than to collaterals, except where some of the claimants come *jure suo*, and others *jure representationis*. A very distinguished lawyer of the present times (to whom his country already stands indebted for his elegant and masterly edition of Justinian's Digests, and to whom it may owe far more if he should prosecute his design of a more enlarged Commentary) seems to have been most aware of this difficulty; and, as if he thought contrary to what was required it, he openly contends on our statute of distribution for excluding the distribution *per stirpes*, even as amongst children, when they are the only claimants: though he confesses, that by Justinian's law it was clearly otherwise, and that he did not meet with any judicial determination which rejected the doctrine in respect to our own law*. But it may be asked, whether our courts of equity would be easily induced to extend this restrictive construction of the distribution of equity to descendants. It was once indeed attempted before the Chancellor Hardwicke. But, after hearing the point discussed, he discouraged the idea of a distribution *per capita*, and gave his opinion against it, though not a final one†.

In this detail, in respect to the cases determined on the statute of Charles the Second, for a distribution *per capita* between persons deriving through different stocks, but all claiming as next of kin in their own persons, I claim to infer, that your Lordship will not be very partial to the principle of the precedent, and consequently will be little inclined to extend it to a great number of cases.

Even if I take this as it may, I for the appellants beg to insist, that the present case is so dissimilar to the cases on the statute of distribution, as to prevent all comparison. Here the great stress of the argument is on the intent of the testator, made manifest by the words and clauses, such as neither occur in the novel of distribution, nor in its intended counterpart our statute of distribution.

See Harris's edition of Justinian's Institutions, in his notes on the novel of page 3. and also in his notes on lib. iii. p. 5.
 Cockyer v. Wade, Barnardist. Chan. Rep. 444.

tion.—*First*, there is the devise over to the testator's sister and brother, and their *respective* executors and administrators in case of default of their not having younger sons.—*Secondly*, there is the subsequent devise over of THE HALF of the testator's fortune, in language pointedly referring to the preceding devise to his sister's and brother's younger son, as to a devise bequeathing the *two branches* of his family in *moieties*.—*Thirdly*, there is an express division *per stirpes*, as against the brother's younger son in favour not only of the sister's eldest son in the event of his not having younger sons, but also eventually in favour of the sister and brother successively. This last provision stands independently of the other special circumstances, independent of all the numerous arguments before urged both from the general plan of the will and the particular language of it, and is fully adequate to distinguishing the present case from the cases of distribution; for who can doubt, if that statute had applied a distribution *per stirpes* in favour of a sister's children, that in the construction it would *pari ratione, pari materia* have reached a brother's?

As to the cases independant of the statute of distribution, the chief of them are *Bretton and Lethieulier*, 2 Vern. 653. *Widdowes and Bradbury*, 2 Vern. 705. *Northey and Strange*, 1 P. Wms. 383. *Davers and Deeves*, 3 P. Wms. 40. *Blackler and Webb*, 1 P. Wms. 383. and *Thomas and Hole*, Forrest 251.—But it is received, that not one of these cases can be applied so as to the construction of the will now in debate. In the first series of cases, what was determined is not stated; and in all the rest the court held for a division *per capita*, it was on general devises to *children* or *grand-children* of various persons unattended with any of those special words and circumstances on which the appellants put in their claim for a distribution *per stirpes*. Besides, in all of them the court apparently took its rule from the construction given for the statute of distribution, so that the same reasons, which exempt the present will from the rule taken on the statute, equally militate against arguing these cases.

CONCLUSION.

Upon the whole I, as counsel for the appellants, do submit to your lordships, that on the first of the three great questions which I have branched the case, the testator's brother, the late Mr. John Wicker, was entitled to the *whole* of the personal property in controversy between the parties; and that though your lordships should decide this first question against the appellants, the late Mr. John Wicker was on both or one of the two

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tions before argued, *at least* intitled to a *moiety* of such pro-
 —It only remains to observe further, that as the two
 er of the three questions, here argued for the appellants,
 before your lordships as new points undebated in the first
 of the cause, and consequently unprejudiced by the princi-
 in which the decree complained of was made : so the third
 ion, which was the only one really debated before the
 below, was, as I understand, decided there on both hear-
 in a manner, which indicated much doubt on the real in-
 of the testator. Under these circumstances I trust, that I
 stand excused for offering to your lordships so large a com-
 on the will in question ; and also that no disadvantage will
 incurred by the appellants themselves, from the circumstance
 wing their claim now argued on larger ground before your
 ships as a court of appeal, than was attempted before the
 of original jurisdiction. Indeed, in this respect, the ap-
 pendants and respondent appear before your lordships on much
 ame footing.—The appellants, it is true, confess, that tho'
 leadings left their counsel at liberty to insist for them on a
 to the *whole* of the property in dispute ; yet it did not strike
 counsel, when the cause was heard before the lord chan-
 , that there was ground to argue for their having more than
 ty.—But then it is equally undeniable by the respondent,
 when he first came into chancery, he only claimed a *moiety*,
 gh afterwards in the cause now before your lordships he in-
 on a title to the whole.—Thus both parties appear at dif-
 times to have been in equal doubt about the extent of their
 tive claims ; and consequently if any prejudice should
 arise, each party is equally affected by it.

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That *heir*
estate for
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APPLIC

B S E R V A T I O N S

CONCERNING THE

RULE in SHELLEY'S CASE,

N A M E L Y,

That *heirs of the body*, or other inheritable words, after an estate for life, shall operate as words of *limitation*, not of *purchase*."

CHIEFLY WITH A VIEW TO THE

APPLICATION of that RULE to LAST WILLS.

Aut Caesar, aut Nullus.

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OBSERVATIONS

CONCERNING THE

RULE in SHELLEY's CASE,

CHIEFLY WITH A VIEW TO THE

APPLICATION of that RULE to LAST WILLS.

IN Shelley's case, as reported by Lord Coke †, the counsel, who argued for the defendant, state it to be a rule in our law,—“ that when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either *mediately* or *immediately* to his heirs in fee or in tail, *always* in such cases *heirs* are words of *limitation* of the estate, and not words of *purchase*.”

The rule ~~be~~^{is} expressed is to be found substantially stated numberless other reports and books of our law, as well those before and in lord Coke's time, as those since published. But it here given from his report of the case of Shelley; because that report is so constantly referred to as the most known depository of the rule, that in common parlance the rule has thence obtained appellation, being for the sake of shortness most usually described as the *Rule in Shelley's case*. It may be added as a further inducement for so extracting the rule, that perhaps it is not to be met with elsewhere in language more fully or more correctly expressive of the doctrine meant to be conveyed.

Concerning this rule there has been long agitated an obstinate and perplexing controversy, on each side of which very eminent judges and lawyers have arranged themselves.

The dispute is not from any doubt of there being such a rule. That a rule to the effect stated was incorporated into our law of real property from the earliest times, constituting a part of the texture of our system; and that the rule still continues in force; are truths too evident to be questioned even by those, who are most inclined to resist and contract its influence. It is the extent in which the rule ought to be applied, not on its great antiquity or its present existence, that the diversity of opinion has been exercised.

It is of the first importance, that all general rules or principles of law should be clearly and entirely understood; for where it is

† 1 Co. 104. 2.

otherwise,

otherwise, the administration of justice must be confused, fluctuating, and arbitrary; the consequence of which is a miserable state of insecurity to the people, whose persons, characters, and property are liable to be affected.

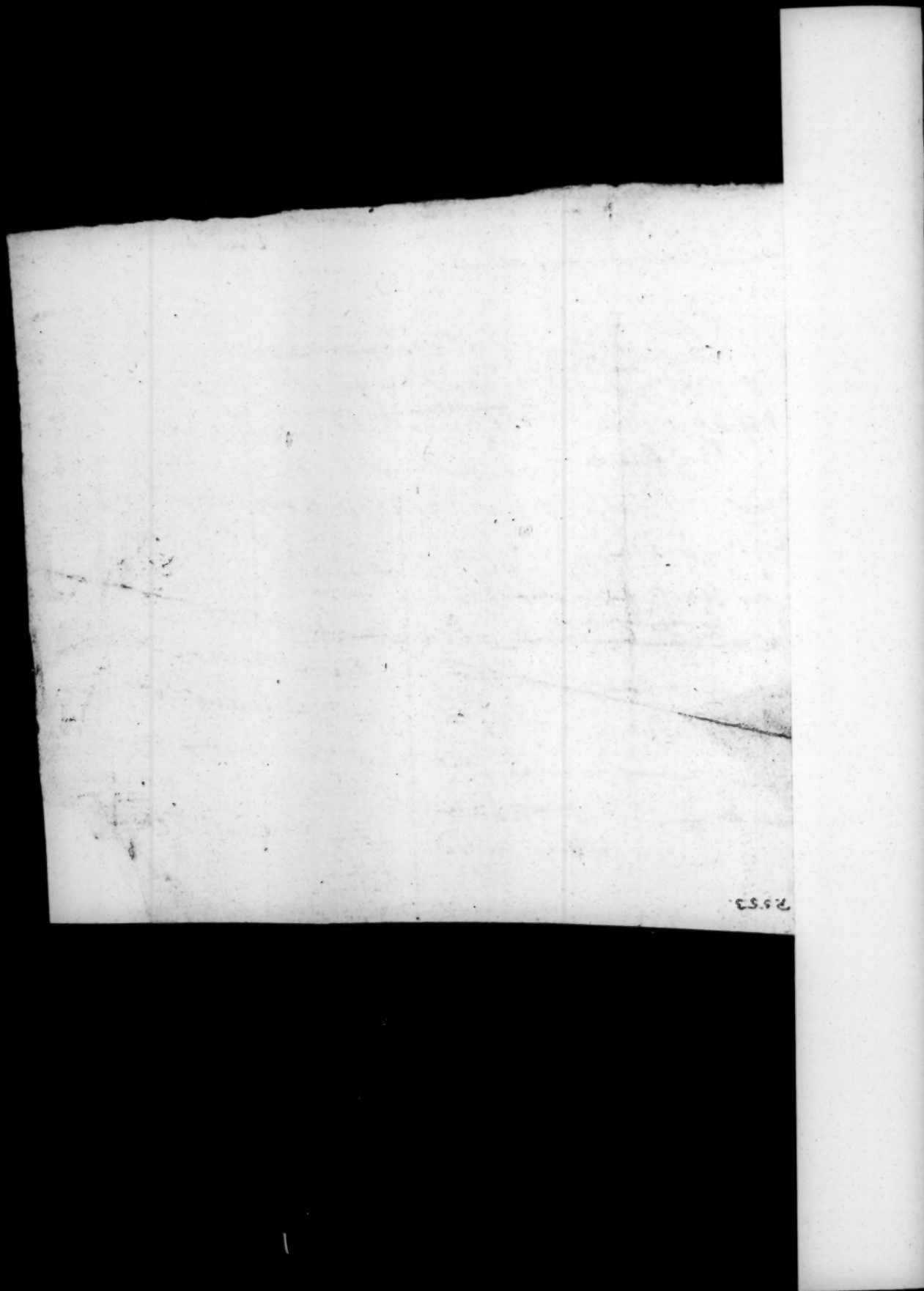
In every point of view the rule of law in question claims to be considered as a general one. It professedly and directly operates upon all the *real* property of the kingdom: and though its original was quite foreign to *personal* estates; yet these, from subsequent causes, and by a sort of adoption, have in some degree been brought within the sphere of its action. The cases in which it becomes requisite to enquire, whether they ought to be governed by this rule, have been continually occurring; and as long as the grand foundations of our present system of law shall remain, those cases must be expected to arise as often in future. Whenever also such cases do occur, the title to the property in dispute must depend on the question, whether the rule ought to be applied or not. If the rule is applied to the entail of real property, it enlarges the estate for life into an inheritance, and arms the tenant for life with the incidental powers of defeating the succession to his heirs, and leaves the entail upon them at his mercy. But where such a case escapes the rule, the entail is most commonly secure against all acts of the tenant for life, the charge or alienation by him becoming fruitless and unavailing from the moment of his death, as much as if his heirs had not been named. In the instance of personal property, where which the rule can never be in the least connected, except where such property is entailed as if it was real estate, the difference between admitting the rule and excluding it is equally conclusive upon the title. If the rule is resorted to, the tenant for life becomes absolute proprietor of the entailed personalty, and the entail is a nullity without so much as the aid of any force to produce that effect; whereas the rule being laid aside, the tenant for life is a mere usufructuary, without any power over the substance of the thing beyond the enjoyment of it for his own time.

Upon this view of the rule it is apparent, that the manner of applying it ought to be directed by some plain, easy, and unambiguous principle; and that if such a rule shall have become involved in the veil of mysterious abstruseness, the titles to both real and personal property must be continually open to great doubts, and consequently to very mischievous litigations.

But notwithstanding this; and also notwithstanding the numerous cases in which the rule has been elaborately argued, and the successive adjudications upon it, more especially the solemn opinions given a few years ago by all the judges of England in the great case of Perrin and Blake; it may be doubted, whether the controversy on the rule is yet satisfactorily closed. Nay, it may even be a question, whether the learned disputations of late

There is indeed a forum ^{the forum of equity} which, ~~and under the~~
~~special circumstances~~ ⁱⁿ jurisdiction over
trusts, is invested with the latitude of framing
modifying an entail ~~for as for a letter~~
~~for the~~ ^{and directing} ~~as shall appear best~~
~~adapted to the~~ ^{his object} ~~general~~ ^{general} intention.

And ~~for~~ where a court of equity goes
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all the entail he has in view, ~~under the~~
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times have not rather tended to shake the true and antient foundation of the rule, than decisively and finally to fix its proper boundary : and if this really be so, there is still remaining every dangerous source of new contentions.

It is feared indeed, that these suggestions of material doubt and complication, in a matter understood by many to be conclusively settled, may expose their author to the imputation of a bold and disgusting presumption. Nor will the danger of his being so charged be a little aggravated, when it is known, that he is a professional lawyer of very inferior consideration, one who is ranked and ever likely to remain in one of the lowest of the forensic classes ; and that his conception of the subject involves him in a difference of sentiment, with some who heretofore have eminently filled, and with others who still sit shining ornaments on the higher juridical forms. He foresees too, that the hazard of offending is still farther augmented in respect of the shades he means to give in the representation of the subject, which constitute at least a semblance of disagreement with some of the most distinguished leaders on both sides of the controversy in question : for though he certainly unites with those who uphold a strict observance of the rule ; yet, as he understands them, it is not altogether upon the same principle ; but upon a reasoning, according to which the rule is even more absolute and peremptory than they seemingly conceive it to be ; and also with an admission, that if the rule was not so unqualifiable as to be quite indispensable, there would be great force in the line of argument chiefly relied on by the enemies of the rule. Thus by taking something like a third course (not of the middle indeed, because his notion carries him into an extremity beyond the most rigid of the two current opinions) he may be considered as a sort of neutral person, and as such fail of being received by either party.

These are discouragements, which might well deter the present observer from attempting to publish his thoughts on a subject, at which the most accomplished understandings are divided. Accordingly he has often laid down the pen, in perfect despair of being able to acquit himself of such a task, in a manner in the least satisfactory to those, for whose use his labours are designed, and to whose judgment the rectitude of his sentiments must of course be referred.

But on the other hand there are considerations of a very opposite tendency. The present observer, after re-iterated study of the nature of the rule in Shelley's case, and the fullest attention to the arguments of others upon it, feels a perfect conviction, that a portion of the genuine spirit of the rule has insensibly evaporated ; that its native strength has been impaired, and its original simplicity disguised, by the subtleties of modern ingenuity ; and

and that unless an effort shall be speedily made to disembar the rule from the perplexities with which it has been lately over-run, it will degenerate, from a plain direction for discriminating titles to property, into a downright enigma for disturbing them. With this impression of some of the prevailing modern comments upon the rule, it is a sort of duty to risqué an attempt for obviating the mischiefs apprehended: and to shrink from the task on account of the threatening dangers would be an unmanly conduct. It is also a very strong incitement to attempt, that the ideas, which are now meant to be submitted to the whole profession of the law, have been long heretofore opened, in private conversation, to some professional friends of distinguished understanding and judgment, and from them have often met more than with a very favourable and indulgent reception; for some of the respectable persons alluded to have often expressed surprize, that they should continue to confine all his thoughts within the narrow circle of his private connections, and be so dilatory and reluctant in execution of his promise to reduce his ideas into a form fit for public use; whence it is natural to infer, that his comment upon the rule in Shelley's case was far from being deemed either a needless or an improper one. Nor are other encouragements altogether wanting. A late judge, whose institutions of our law and other juridical writings ought to perpetuate his fame a short time before his death, imperfectly heard from the present observer, what was the general import of his sentiments on the rule in Shelley's case; and it is hoped, that the most delicate feelings, in respect to private conversation, will not be offended at the now observer's so far seeking for shelter from impressions seemingly made on that very great judge, as to confess, that he did not appear displeased with the explanations heard. If, therefore, the present observer did not, from blind and extravagant partiality for his own notion, misinterpret the manner in which they were thus received, it may be said to have approached to a sort of implied sanction to a more extended communication. If too this be an allowable construction, it deserves more weight; because, however differently Mr. Justice Blackstone's own arrangement of the authorities, in his famous argument on Perrin and Blake, may tend, yet his ideas of the principle and force of the rule most apparently clash with the which will be here disclosed: for in that argument he not only most expressly excludes the rule from the class of those high rules or maxims which are founded upon some positive national policy, but even refuses to admit the rule into that second class of rules of policy which he denominates *juridical*, and ranks it one step lower than what are considered as rules for construing and interpreting the intention of parties. That with such a restricted conception of the power of the rule, he should not with-

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ending listen with an appearance of anxious attention to the disclosure of a comment like that of the present observer, which induces the rule to be quite *imperative* to intention, was at least a great stretch of politeness to one, who in station, years, and every possible point of view, stood at such a distance from him; so great indeed, that if it was nothing more, it may be well deemed an excess in a point, which in the present observer's mind is not easily exceeded.—Further, it operates as a great encouragement to the present observer's risking the publication of his notions about the rule in question, that substantially they appear in great measure to accord with those attributed to a living judge of the equity of the first rank and description. At least it may be collected from the printed report of his judgment in the great cause of Jones and Morgan (*a*) in its latter stage, that his general impressions of the rule are not unfamiliar to those, which it is here intended to state and insist upon in a full and particular manner. If this remark be well founded, it may of itself suffice to prevent a desertion of the present attempt.—But it is due to the distinguished persons, with whom the present observer as he converses essentially differs, to acknowledge, that even in them he finds resource for inspiring him with confidence in the avowal of his sentiments. It is the concomitant of low and ill-instructed minds to despise every thing, which either comes from persons with inferior pretensions, or clashes with their own pre-conceived notions. But there is usually a liberality incident to elevated

(a) The equity branch of this cause is reported in a volume of recent cases in chancery, for which the profession of the law is indebted to William Brown, Esq; it is to be hoped, that this respectable gentleman will persevere, in his very laudable endeavours to give a communication of decisions in chancery with all possible earliness after their delivery; and that those endeavours will be assisted by an encouragement from all professional persons, adequate to the effectual support of the present plan of a regular periodical publication. In this latter mode of publishing reports, he was preceded by two gentlemen of the bar, who have lately commenced an undertaking to publish the decisions in the king's bench, within a short period after each term: in which arduous attempt they have hitherto acquitted themselves so as to command applause. But still there are wanting reporters upon a like plan for the courts of common-pleas and exchequer. It may, however, be reasonably expected, that this chasm in the responses from our juridical oracles will not much longer remain unsupplied. At least it will be remarkable, if amongst the learned advocates continually attendant upon these two latter courts, none could be found, having enough of leisure from practice, and of zeal for professional instruction, to influence them into an enterprize of such apparent public utility. Should a quick, regular, and authentick publication of the decisions of the four great courts in Westminster-hall, such as is here pointed at, be once permanently established; this, with occasional aids from accomplished reporters like Mr. Douglas, would ensure a continual and almost immediate communication, not only between one of these courts and another, but between all of them and the whole profession of practising lawyers throughout the kingdom. In consequence also of this and extending circulation of legal and equitable learning, the clashing discrepancy of decision, otherwise unavoidable, might be in a great measure obviated, as the plan of regularly periodical reports, being ably and steadily pursued, might materially contribute to enlightening the respective systems of law and equity, and consequently to preserving them upon the solid foundations of distinctness, certainty, and uniformity:—a consummation, which would necessarily contract the source of long and expensive litigation, by suppressing some of its most fruitful sources.

and highly cultivated minds, which almost ever disposes them to give a generous shelter to well-intentioned investigations of scientific subjects, however personally unimportant the adventure in them may be. It also belongs to persons with such minds not to forget the wondrous fallibility of the human understanding, or to be unconscious, that even in its highest perfection it sometimes falls into errors, which are escaped by an ordinary capacity; and thence it is, that they are so often found to rise above that obstinate prejudice in favour of their own opinion which shuts the ear against all reasoning to the contrary.

Having prefaced so much to engage the favour and indulgence of his readers, the present observer will now proceed to detail what are the innovations he had to complain of; what are the grounds upon which he presumes to call into question the modern doctrine upon the rule in Shelley's case; what are the points of that doctrine, which alarm him as having a tendency to subvert the rule, and to produce an embarrassing uncertainty; and what is the favourite construction, which he would enforce, to simplify and fix the application of the rule, and to rescue it from all future ambiguity.

The whole grievance, which it is here intended to point out and remove, if it really exists, has insensibly grown amongst the expounders and debaters on the rule in Shelley's case, from considering it with too much and too indulgent a reference to the views and *intentions* of testators and other authors of entails.

When it is collected, how frequently the rule must necessarily cross and interrupt one object almost ever in view on the trail of estates, it may be easily accounted for, that the controversy should have taken a turn so connected with intention. In the cases in which the question arises, whether the rule shall govern or not, it almost ever occurs, that the author of the entail does not mean, that the tenant for life, to the heirs of whose body the remainder is limited, should have power to defeat the succession to them by an alienation to their prejudice. Anxiously and formally to aim at creating a strict entail, and at the same time to intend that the first taker of the estate shall be competent to destroy it at his pleasure, is an inconsistency too improbable to be justly imputed. But hence a sort of opposition necessarily arises between the rule in Shelley's case and the intention of the party entailing: for if the rule is applied, it immediately gives to the tenant for life the opportunity of disappointing the succession established in favour of his heirs; whereas if the rule is not applied, the succession is invulnerable by him. The rule and the intention then drawing in these opposite directions, it naturally causes a temptation to avoid the former in such cases to the utmost, for the sake of accomplishing the latter as far as our policy against the perpetuity of entails will allow.

The explanation, it is apprehended, exhibits the true source and spring of the controversy in question, the real origin of all the numerous contentions about the force of the rule. If the rule and the intention accorded, there would be no room for hesitation about applying the rule. It is therefore from their clashing only, that the contest could arise.

Accordingly some of those, who seek to avoid the rule in Shelley's case, where if applied it would enable a tenant for life to disappoint his posterity of the provision intended for them, place their whole strength of argument upon the apparent intention of the author of the entail, not to leave it in the choice of the tenant for life, whether his heirs or the heirs of his body should succeed him in the possession of the estate or not. Taking, therefore, intention for their grand principle of argument, they inspect the will or other instrument creating the entail with an eagle's eye; and not a sentence in the instrument, not so much as a single word from which the least spark of light to make clear the intention can be collected, escapes their active and sedulous observation. Judiciously and skilfully too, in order to fix the mind on their favourite object, and prevent all wandering to any other consideration, they assume it as a thing neither controvertible nor controvertible, that the intention to give a power of alienation to the tenant for life must decide, whether the rule shall prevail or be rejected.

That the opposers of the rule should take this course in their argument was natural, or rather unavoidable; for upon any other principle than intention to create such a strict entail, as should defend the succession against the tenant for life, invention itself would be at a loss for matter wherewith to raise the least doubt on the rule.

But it is not so easy to account for their falling into the same course of argument on the other side of the question. One should have thought, that the friends of the rule would have seen, that the mere intention to prevent a tenant for life from having power over the entail was sufficient to repel the rule, it would be possible to sustain its application in any of the contested cases on the subject; for there is scarce one of them, in which a person unblinded by the frequency and mist of disputations subtlety could fail seeing, that it was not the intent to invest the tenant for life with a power to defeat the succession to his heirs. Even the single circumstance of giving an express estate for life leads to a conjecture against such an intent. But where the estate given by words negating a greater estate; as where a devise is made *one for life only*, or *for life and no longer*; or where powers of leasing or jointuring are either given or refused to the tenant for life; or where he is restrained from committing waste; surely this is more than conjecture, that the testator or donor did not mean

mean to have the remainder to the heirs of the body of the tenant for life so construed as to enable his selling or giving away the inheritance itself; it is surely most strong and persuasive evidence. How much less then can it be convincing argued, that a tenant for life was intended to have such a power to dispossess his children and posterity of the entailed property; when the author of the entail, in order to prevent such effect and consequence, interposes between the estate of the tenant for life and the remainder to the heirs of his body, an estate to trustees to preserve contingent remainders, of which the professed and only object is to guard the succession against all acts destructive of it by the tenant for life? To insist, that even in such a case there is not sufficient evidence of an intention to deny to the tenant for life the power of breaking the entail and stripping his issue of the estate seems to be such an extreme, as can only originate from the supposition of decisive judicial precedents, the ponderous weight which from their number and respectability becomes absolutely irresistible, without breach of the reverence justly due to the strong current of past decisions. If also the rule really is under the controul of intention, how can it be reasonably urged, that it ought not to prevail in cases, in which the intention is confessedly disappointed by applying the rule?

Had the friends of the rule in Shelley's case thus seen the dubiousness, if not the impracticability, of defending its operation on the ground of intention, they would scarce have consented to put the rule to a test so hazardous. On the contrary, they would have explored for and studied the principle of the rule, however deeply laid as one of the first foundations of our system of property, till they had been able to draw forth for use the merit and quality of the rule in its purest state; and so could have been convinced, that the intention of the framer of an entail to have the rule applied, was not the real and proper issue for trial between them and their opponents in the controversy.

But unfortunately for those, whose titles may become the subject of controversy on the rule, some of its advocates either do not see the danger of so arguing upon it, or had so much confidence in the acknowledgment of its existence and the series of precedents against departing from its application, as to be at least careless in the mode of defence in other respects. This at least may be probably inferred from their conduct; for by consenting to argue the rule in some degree upon intention, they appear to have been gradually betrayed into a sort of concession, that, whether the author of the entail in question meant to avoid the rule or to have it applied, was the true point to be considered.

That the controversy has taken this turn amongst some of the most distinguished friends to the rule, it would be easy to pro-

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By an abundance of passages from the arguments used in most of the great contested cases since the judgment of the king's-bench in *Coulson and Coulson*, which case was decided as long ago as 1740. But to do this in a regular way, by collecting all the instances, would be a tiresome undertaking; and unless the assertion shall be denied, an unnecessary one. Therefore it may perhaps be sufficient to observe, that, in Mr. Justice Blackstone's argument in *Perrin and Blake*, that late eminent judge most expressly avows treating the rule in Shelley's case as subversive to the intention, where it appears with sufficient explicitness; and, as has been already hinted at, pointedly ranks the rule in the second class of those flexible rules of law, which give way the moment they manifestly clash with the intention of the party whose entail is the subject of discussion. There is indeed in one part of his argument a distinction taken by him, between an intent not to give a power of alienation, and an intent to negative the rule; and finally he admits the completeness of the evidence of the former in the case of *Perrin and Blake*, but denies the sufficiency of the latter. However, even upon this remark the rule is made to be dependant upon intention, though quite in the same form and degree, as it is made by other supporters of the rule; who appear to argue on intention more generally and indiscriminately, as if it was a question of intention, but one, in which on account of some peculiar sacredness in the language of remainders to the heirs of the body or the heirs general of a tenant for life, nothing less than an express negative might be deemed sufficient evidence of an intent to use the words in a sense different from the technical one. Thus the application of the famous rule in Shelley's case has been debated upon, until at length, even with some of its defenders, it is seemingly treated, as if it was left to the intention of parties to decide, what shall be a *descent* and what shall be a *pur- chase*; and as if the rule was a mere instrument to interpret, in favour of which of the two constructions the evidence of intent either preponderates.

This brings forward the very point, which it is here proposed to consider; for it is this turn of the argument on the rule in Shelley's case, which, as the present observer has ever been struck with the subject, is the cause of all the embarrassment and ambiguity; and which, till it shall be entirely obviated, and the true quality of the rule shall be recalled into remembrance that, with its antient vigour shall be renovated, will continue to have the rule effect.

There then is the proper place for pointedly and explicitly stating, wherein it is, that the present observer supposes his ideas of the rule to differ from those which he deems so erroneous.

The general objection, which he makes to the current reasonings upon the rule, is, that on both sides of the controversy the rule is in danger of being sacrificed, by referring its application to the intention of the party, whose will or conveyance happens to be the subject of discussion. But the force of this general difference will be best understood, by a more particular contrast of his own notions with those he is encountering.

On the part of those who are studious to avoid the rule, it is avowed, that they consider the rule as wholly subordinate and subservient to the intention, as a rule of interpretation, a merely technical construction of words, which yields to the intention whenever they are opposed to each other. That the rule should be of this obedient nature, is the very essence of their argument. They first examine the will, or other instrument, to see whether a strict entail was intended or not, by referring, either in the positive and emphatic manner of giving an estate for life with its other circumstances, or to the still stronger evidence of an interposed estate to trustees to guard against any injury to the entail. Having clearly established, that it was meant by the testator to give the remainder to the heirs of the body of the tenant for life, not to give him a power of barring the entail to those heirs, but on the contrary to restrain him from so doing, then they think, that their victory over the rule is complete; for they immediately add, that to make such strict entail, and so to restrain the tenant for life, was a lawful intention, and consequently ought not to be disappointed, by a harsh application of an old rule, the principle of which they consider as long expired and obsolete.

On the other hand some of those, who are against so easily dispensing with an application of the rule, seemingly give countenance to the reasoning of their competitors, by insisting that to depart from established rules of interpretation; to build in upon the established and appropriated sense of words so long used in settling and limiting the inheritance of real property, for the sake of humouring a testator's intention in avoidance of the construction prescribed in Shelley's case; and to set at defiance a series of the most authoritative decisions, which are the accumulation of ages; is levelling the great land-marks, by which the titles to real property are ascertained, and substituting in their room a monstrous latitude of arbitrary and uncertain construction. Even this stile of answering the attackers of the rule in Shelley's case is of a tendency, leading to a sort of implied admission, that if it was not for the technical and artificial sense of the words *heirs of the body* and *heirs*, and the accumulation of authorities and practice in favour of such established port, the rule in Shelley's case might yield to intention. As appears from the notice already taken of Mr. Justice Blackstone's argument in Perrin and Blake, it is not left to mere

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lication, that the defenders of the rule, or at least some of them, consider it as in a degree controulable by intention to avoid it; for so he expressly states the rule to be.

But the present observer thinks, that he sees something to approve, and something to condemn, in both of these discordant comments upon the rule: and that in both there is one common error, though not in the same proportion.

To the opponents of the rule, he admits, that where the rule would disappoint the lawful intention sufficiently expressed, it ought not to be applied. But then he asks, *whether it is not a begging of the question to assert, that the intention is lawful?* The rule, as he considers it, is a conclusion of law upon certain premises so absolute, as not to leave anything to intention, if those premises really belong to the case; and those premises, he intends, are an intention by *heirs of the body*, or other words of inheritance, to comprehend the whole life of heirs to the tenant for life, and so to build a succession upon his preceding estate of freehold. This being so, if in such a case the word *heirs* is used in this its large and proper sense, it is a contradiction of the rule to intend, that the remainder to the heirs shall operate by purchase, and such intent is not lawful. It therefore behoves those, who wish to prevent the rule from applying, to shew, that the word *heirs* is not used in the large sense, and to include a succession; but is used in a peculiar and restrictive sense, and intended merely to describe certain persons, who at the death of the tenant for life may answer to that description; and, in the opinion of the now observer, nothing less can exempt the case from the rule; because nothing less will prevent its being the case, which the rule was made to govern. It is further intended to the same persons, that in construing the instrument in question, more especially if it is a last will, the legally technical sense of the usual language in limiting the inheritance of estates, such as a remainder to *heirs of the body* or to *heirs general*, ought not to be adopted, where it is apparent from other passages or words in the same instrument, that it was the meaning of the party to apply the words in a different and more restrictive sense. But then this concession must be qualified, by adding to it, what is already expressed, that in the now observer's opinion nothing less than shewing, that by *heirs of the body* or *general*, the whole line and succession of heirs to the tenant for life, or in other words the whole of his inheritable blood, was not meant, which in Perrin and Blake and most of the considered cases neither was nor could be pretended, can prove an intention to deviate from the legal sense of the words.

With the defenders of the rule, he agrees, that the greatest force ought ever to be shewn to judicial precedents; that to

treat them with any thing like levity or captiousness, is of a more dangerous tendency ; that the precedents in favour of the rule in Shelley's case are too antient, too numerous, too uniform, and too respectable, to be fairly resisted ; that the rule ought to be as sacred now, as it was in the time of Lord Coke ; and that to give up a particle of its authority, is indeed to remove all the antient landmarks, and will be a terrible shock both to present and future titles to property throughout the kingdom. Yet he concurs in these sentiments, not because the words *heirs of the body* or rather technical words of inheritance used by conveyancers in wills and deeds, are more sacred, more stubborn, more inflexible, than other phrases having acquired a settled legal and appropriated sense ; or because he construes the judicial decision upon the rule, as bestowing a pre-eminence upon remainders to heirs after an estate for life over other forms of technical expression. Nor is he afraid of that liberal interpretation of the rule in Shelley's case, which professes to reject the technical sense of such remainders to heirs as are the object of its operation, when it clearly appears, that a testator applies the words *heirs* in a peculiar sense of his own. On the contrary he approves of such liberality, so long as it is confined within its bounds, and not confounded with that arbitrary discretion, which aims to submit every thing to the caprice of the judge for the time being. Nay, it is this very liberality, which, as he construes the subject, is best adapted to bring the rule in Shelley's case to the proper test : for, in his apprehension, it produces the same issue ; namely, whether the party entailing means to build up the succession of heirs on the estate of the tenant for life, and so to establish those premises on which only the rule proceeds, or whether such be the intent, then he would apply the rule, even though the party should express in his will, that the rule should not be applied, and that the remainder to the heirs of the tenant for life, should operate by PURCHASE ; which strong sort of case has not yet occurred in a court of justice, though it certainly has been the subject of private consultation. This is the alternative into which the observer resolves every case arising upon the rule, whether by deed or will : because he doth not concur with Justice Blackstone and other supporters of the rule, in considering it as a mere rule of technical construction or interpretation, but as a rule subservient and subordinate to the intention of parties, and therefore as flexible, accommodating, and obedient ; because he confidently believes, that the rule is a policy of law, which leaves nothing to intention, where the premises to which only it applies really exist ; and consequently that it is of a nature not only rigid, stubborn, imperious, irresistible, and so indispensable, but also to be above all exception whatever.

Thus it appears that the now observer's notions do not altogether accord with those of either side of the controversy. With the enemies of the rule in Shelley's case, though he one moment yields to the liberality of construction, which is the strength of their argument: yet the next moment he claims to take from them all benefit of the concession; by insisting, that this very liberality brings the only cases, in which the contest is subsisting, within the fullest meaning of the rule; and that this being so, not even an intent expressed by negative words can avail it. With the friends of the rule, he exclaims against the least encroachment upon it, and holds the leading cases in which the difference arises, to be clearly governable by it: but at the same time he avows his fears, that they attribute lenient and relaxing qualities to the rule, which once completely insinuated into its constitution must finally produce its subversion. In other words, whilst he applauds the one side for being so liberal, he blames the other side for not being more rigorous. In exploring whether the premises, on which the rule proceeds, are existing or not, he is studious to find out and to indulge the intention; but at the moment the intention to establish those premises is discovered, he disregards every other intention, and obdurately applies the rule, though ever so strongly solicited to the contrary. He travels part of the way with the most inveterate adversaries of the rule; but at the end of his journey he is forced to quit them, and so he arrives at the same conclusion with its most sanguine friends. If he can prove, that his path is the right one, he hopes, not only to avoid offending either party, but to be an instrument in reconciling both: because one party will see the cause of their enmity to the rule removed; and the other party will see their favour to the rule justified, and the rule itself made appear even more sacred than some of themselves have represented it.

It now remains to explain, on what grounds it is thus asserted, that *at law* the rule is of that inflexible nature, which is before described; and that nothing less, than evidence of intention, by a remainder to the *heirs general* or *special* of a preceding tenant for life, not to include a succession of heirs, but merely design certain person or persons answering to that description at one particular instant of time, namely the death of the tenant for life, can suffice to exempt such a remainder from the operation of the rule.

However, the subject having been so laboured, in opening what are apprehended to be the current errors upon the rule; and all the points of difference between the sentiments of both parties to the controversy in question, having been so minutely contrasted, not only with each other, but with the ideas of the observer; it is expected by him, that he shall be able to compress

press his further remarks, or at least those he means to make at present, within tolerably narrow bounds. From a preliminary explanation so extended, it may even be supposed, that the quick discernment of those learned persons, to whom he is submitting his thoughts, will in great measure anticipate him in the subsequent part of the present undertaking. Indeed such an anticipation may happen without any exercise of discernment, because he has for many years made the rule a subject of private discourse with many professional gentlemen of eminence; and as those alluded to can testify, has ever laboured to impress ideas of the rule similar to those now published.

In order to justify his manner of considering the rule in Shelley's case, as before stated, the present observer will now proceed to consider the *principle* of the rule more at large.

It is apprehended, that the genuine source of the rule in Shelley's case is an ancient policy of our law, the aim of which was to guard against the creation of estates of inheritance, with qualities incidents and restrictions foreign to their nature.

Some of the instances of this policy are perfectly familiar to lawyers, and so acknowledged, that the proof of them by authorities is needless.

Thus it is one of the properties of an estate in fee simple, that it may be alienated by the party seised; and this power, with some little exception, has been inseparably incident to such an estate ever since the statute of *quia emptores terrarum* in the 18th of Edward the First removed the ancient shackles of alienation. If therefore a gift or a devise is made to one and his heirs, with condition not to alien, the condition is void in law. On the establishment of common recoveries in the reign of Edward the Fourth, it became an incident to an estate in fee tail, that the party seised of it should have power to bar the entail, not only as against the issue in tail, but also as against all persons in remainder or reversion. By force also of statutes made in the reign of Henry the Seventh and Henry the Eighth, tenants in tail gained a power of barring their own issue by a fine with proclamations, without resorting to the more extensive operation of a common recovery. These incidental powers being then annexed to estates in tail, it became a rule, that if an estate was given or devised to one and the heirs of his body, on condition not to bar the entail by a recovery or fine, the condition shall be reprobated and have no effect; which in the instance of the common recovery is the stronger, because *that* originally, and before its being sanctioned by long practice and by statutes to regulate it, was a fiction contrived in fraud of the law of entail as protected by the statute *de donis*. Curtesy and dower are

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appointment of law incidents to estates of inheritance, whether in fee simple or in fee tail. If therefore a gift or devise is made of such estate with an express declaration, that there should be neither curtesy nor dower out of them, it would be a vain attempt to controul a quality, which is adherent to them by the bounty of the law in favour of husbands and wives, and for the encouragement of matrimony.

It has not commonly occurred to those engaged in the controversy about the rule in Shelley's case, that these known examples of incidents inseparable from estates of inheritance, if duly reflected upon, lead the mind into the discovery of a foundation for the rule, which in a moment renders it paramount to and independent of all private intention, and reduces the latter into a mere subordination to the policy and provision of the law.

This assertion comes from the present observer, in consequence of a firm persuasion, that the rule in Shelley's case is simply one branch of a policy of law adopted to prevent annexing to a real estate the qualities and properties of a *purchase*, and so is calculated to render impossible the creation of an *amphibious* species of inheritance: that is, an estate of freehold with a perpetual succession to heirs without the other properties of an inheritance; in other words, an inheritance in the first ancestor, with the privilege of vesting in his heirs by purchase; the succession of heirs to an ancestor without the legal effects of a descent; a compound of descent and purchase.

The reasons against suffering *succession* or *descent* to be stripped of its own proper incidents, and to be disguised with the properties of a *purchase*, were many and cogent; and though some of those reasons have been impaired in their force, by the conversion of tenure by knight's service into socage, and by other changes of our common law by statutes, yet there still remains fortification enough to resist the evils, which might ensue, if the law should endure the engraftment of *purchase* upon the stock of *descent*.

The tendency of a commixture of subjects, so opposite and discordant as *succession* and *purchase*, to produce confusion and disorder in the system of our law in respect to estates in land, and to destroy its admired discrimination of them, was of itself sufficient to provoke the establishment of barriers against the admission of the novelty. Had it once gained reception, what would have become of all those lines of distinction, by which we so easily and certainly discriminate inheritances from mere estates of freehold, and one species of both from another? Such a precedent once made for newly-fangled estates and interests in land, what would have become of all the numberless discriminations between the incidents, qualities, properties, and concomitants of one kind of estate, and those of another? Must not the code of our law on the subject of estates in land have been exposed to many new tinctures and superinductions, as the invention of every

every private adventurer in law-empiricism should from time to time have thought fit to incorporate? If the system had been left open to such continual invasions, the succinct though clear and comprehensive institution of the law of tenures by the venerable Littleton, and the copious and profound illustrations of him by the great commentator Lord Coke, with others of our antient and valuable depositaries of law, most probably would long before the present æra have ceased to be the faithful guides in this branch of English jurisprudence; and in place of the pure and certain system promulged in them, we should now be overwhelmed by one, which from its constitution would be ever acquiring new properties at the pleasure of every proprietor of land, and consequently be liable to a never-ceasing accumulation of novelty and uncertainty. The rules of our law in respect to titles of real property are necessarily open to frequent changes from legislative interposition and the variety of judicial interpretation; and these alone, from the weakness and fallibility of human wisdom, even in the aggregate exertion of it by parliament, and in the chastest exercise by the most enlightened judges, too often operate to the prejudice of our system. There wants not the aid of private and individual unskilfulness and caprice, either to encrease its fluctuation, or to distort its original simplicity.

It was another very important inducement to render impracticable the blending of the effects of *purchase* with the title by *succession*, that the consequence must have been a continual source of fraud upon feudal tenure. When the heir came in by *succession* or *descent*, and was under age, the lord of the fee was entitled to those grand fruits of military tenure, *wardship* and *marriage*. But if the heir took by *purchase*, only the trifling acknowledgment for a relief was due to the lord. It was, therefore, an object of the first magnitude in the consideration of feudal policy in England, not to leave it to the intention and choice of the tenant, what should be a descent, what a purchase: for this would have placed the most valued rights of the lord at the mercy of him, to the disadvantage of whose family they operated; and would therefore have been as absurd, as to have authorised the lord to make what he pleased a descent for the sake of augmenting his seignioral profits. Thus to enforce justice between lord and tenant, and to guard the former against fraud, the latter against oppression, it became essential to both, that the boundary between descent and purchase should be raised on a standard of discrimination wholly independant of and unalterable by either.

Nor were the rights of the feudal lord the only interests at stake in having the incidents to succession and descent preserved inviolate. Where the succession was to a fee simple, it was

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consequence to the specialty creditors of the tenant, who died so
 if, that his heir should not have the benefit of the title by
 descent or succession, and at the same time evade its disadvanta-
 ges under colour of taking as a purchaser. So long, indeed, as
 the feudal restraints of alienation continued in full vigour, the ten-
 ant was disabled from charging the land with his debts of any
 kind; and so long it was indifferent to his creditors, in what
 way the heir took the estate upon his ancestor's death. But the
 restraints of alienation were broken through and in a great mea-
 sure dissolved in the reigns of our first and third Edwards: and
 henceforward it became a justice due to the specialty creditor,
 that the descent to the heir should not operate with the qualities
 of a purchase. If on the ancestor's death, the heir succeeded
 with the effect of descent, the land descended was affets to satisfy
 the demands of specialty creditors: whereas if it had been al-
 lowed to the heir to succeed to the estate as a purchaser, such
 creditors would have been injured; it being clear, that land vest-
 ed by purchase was not affets, and therefore not liable to their
 demands. This difference to creditors between purchase and des-
 cent is notorious; and in consequence of it, even a devise of land
 is not liable to his testator's specialty debts, till the case was re-
 medied by the third of William and Mary chap. 14. which cor-
 rected the hardship, by making *devisees* chargeable for debts
 equally with heirs.

A third class of persons interested against the permission of le-
 gacy by *succession* without the consequences appropriated to it by law,
 was introduced of persons having rights of action for recovery of the
 inheritance of land. There is inherent in our ancient law a
 strong aversion to having either the freehold or inheritance of
 land in a state of *abeyance*. At this moment an abeyance of the
 freehold is not endured by our law for one moment, except in a
 few special cases of extreme necessity, such as during the vacancy
 of ecclesiastical benefices; and though it must be confessed, that
 inheritance may be kept in abeyance, yet it ever was and
 is discouraged as far as it well can be without an entire pro-
 hibition. The reasons of this odium to abeyance plainly are,
 that during a suspension either of freehold or inheritance there
 necessarily also a suspension of various operations of law, more
 especially of the several denominations of remedies for the reco-
 very of land by real actions. Whilst such actions were the com-
 mon modes of trying titles to real estate, it would have been a
 source of the most mischievous tendency, if there had not
 been some rules of law to confine abeyance within due bounds.
 Now, when the remedy by ejectment is become so enlarged
 and improved, as to be accommodated to the trial of most titles
 and, cases will sometimes occur, in which, from loss of the
 right of entry by lapse of time and the statutes of limitation, seri-
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ous inconveniencies may arise to suitors from an abeyance of the inheritance ; as in such instances, whilst it continues, it may disappoint claimants of the inheritance of the only remedies the law gives to enforce their rights. Had it, therefore, ever been allowed to disannex from the title by succession the qualities of descent, by suffering heirs to come in by the title of heirship with all its privileges, and yet at the same time to shelter themselves as purchasers against all adverse claimants of the inheritance of the land descended, the hardship of a temporary and occasional suspension of actions for the inheritance might have been gradually converted into the mischief of a perpetual bar to the use of them. Mr. justice Blackstone, in his argument in *Perrin and Blake*, adverts fully to some of the most striking inconveniencies from abeyance ; and thence seems to lay a particular stress on this odium of our law to it, as if it was the chief foundation of the rule in *Shelley's case*, and had been more conducive to its introduction, than any of the reasons usually assigned ; in support of which sentiment, he more particularly appeals to a case in the year-book of the 18th of Edw. II. fol. 577. The presiding observer, indeed, is not at this time sufficiently convinced to join in classing the mischiefs from abeyance above all the other reasons for the rule. But yet he concurs in thinking, that the mischiefs may well be ranked amongst some of the chief reasons for the policy against suffering heirs, who succeed as such, and take as purchasers.

It might also be a further reason for drawing the line between descent and purchase *imperatively*, that to have left it open to private intention to blend the effects of purchase with heirship, would have tended to breed confusion in the law of succession by which the descent of land is directed. Where the fee simple vests in a heir by purchase, the heirs *ex parte paternâ* succeed in infinitum in preference to the heirs on the mother's side ; but the former line of heirs failing, the latter line comes in ; and till this alternative is exhausted, the lord's title by escheat *propter defectum sanguinis* cannot attach. Suppose then a feudal donation to have been sufficiently made to a woman and her heirs, with an express intention of providing for her heirs lineal and collateral ; but that, in order to avoid the lord's feudal perquisites, the donor added that the heirs of the woman should succeed as purchasers : suppose farther the donee to have died leaving only a son, and afterwards this son to have died without issue, and without having attempted any act to disturb the succession : in such a case it would have been clear, that one part of the donor's intention was to constitute a succession in favour of the woman's family. Yet if the law would have suffered the donor's other intention of introducing her heirs by purchase to prevail, the consequence would

ould have been, not merely extending the succession to a line
 heirs foreign to the donor's views, but even preferring such
 ne in *infinitum* to that line, to which only the donor looked.
 at this would have been the result, will appear by considering
 at from the son's taking by purchase, *his* heirs would have
 ken instead of *his mother's*; that is, first his heirs on the fa-
 er's side; and these ceasing, then those on the mother's.
 us by accomplishing the unreasonable inconsistency of a vest-
 by purchase, where the reality was a case of descent, the do-
 or would have become the instrument of defeating his own plan
 succession almost as soon as it was established, by the exclusion
 that family of heirs, which only he had in view, till another
 ily of heirs perfect strangers to the object of his gift was whol-
 exhausted; and so this, like most other improper gratificati-
 ons, would have injured the very person it would have been
 ant to oblige. Nor doth this single case shew nearly the full
 ; in sum of the mischiefs, which would have arisen to the law of
 to a c succession from enduring a conjunction of the heterogeneous
 ne prefer- abilities of purchase and descent. The case supposed is only the
 vinced- chance of one striking inconvenience. But had it been once
 the oth- owed to vest a fee simple in any person, and to give the effect
 that the purchase in respect of the first heir succeeding, it might have
 ef reason- gradually to an indulgence of the like sort upon every des-
 such, c, and then the succession would have been ever tak-
 a new course; because every descent would have
 e between- a new *terminus* from which the heirs were to
 open to p- taken. By yielding also to such a continual shifting of
 hip, w succession, the unity and order of our law of descents would
 a by wh- been fundamentally disturbed; and one line of succession
 vests in- d have been continually excluding another by a rotation,
 n *infinitum* principle of which seems necessarily generative of eternal
 the form- age. Thus too in the place of our present certain and uner-
 this alth- rules of descent, such an entanglement might at length
 n *sanguis* accumulated, as would have rendered the derivation of title
 ve been- heirship a pursuit almost without end, and consequently im-
 refs inter- dicable. The present observer will not stop to push this to-
 but that, from the order of succession any farther. But to him it seems
 onor add- able, that much greater force might be given to the argu-
 asfers: at thence deducible, by a more profound study of this part of
 on, and subje&; and by considering minutely, how each of our
 hout hav- ing rules or canons of descent would be affected by the in-
 h a case- troduction of a new purchaser on every descent, and by the con-
 r's inten- tinually continued change of the *terminus*, or stock, from
 an's fam- h succession of heirs is to be taken.
 intention- om all these considerations it seems apparent, that if our
 consequ- ad suffered the qualities of purchase to be blended with those
 we ship, private intention would have broken down its most
 sacred

sacred dispositions and distinctions. Its policy against the invention of new kinds of estates in land, its policy to prevent frauds upon the lord and oppression of the tenant, its policy in favour of specialty creditors, its policy against abatement of the inheritance, its policy in the order of succession; all the favourites of our law might have been successfully invaded, had not some means been prescribed to guard them against being at the mercy of the caprices of private intention.

If seeking for more aid did not appear superfluous, the reasons against receiving the real heir as a purchaser might be variously amplified. If such an inconsistency could have been tolerated, would it not also have followed, that private intention might have constituted fee simple without power of alienation and fee tail without power to bar by fine and common recovery with inheritances of each kind, without forfeiture for crime without curtesy for husbands, without dower for wives, without the power of leasing, without the privilege of committing waste? To express it more shortly, if private intention had been permitted to annex to real heirship the contradiction of vesting by purchase, what principle of our law would have remained, to resist stripping the title by succession of all the other effects and consequences legally appropriated to it?

Nay, even this is not the full extent of the argument against yielding to private intention. If private intention might thus dispossess inheritance of its legal properties and incidents, would it not an exertion of the like intention also separate from estates for life and estates for years their essential peculiarities, and why might it not strip an inheritance in fee, coming from purchase, of its course of succession, and of its other properties, and in the place of them annex to it the privileges and appurtenances of *heirship*? In truth, from the nature of the principle against the combination of *purchase* with *descent* by the stretch of private intention, there crowds in upon the mind such an eternal train of objections, as demonstrates, that the more the subject shall be investigated, the higher the proof will rise, that such a combination could not be admitted to have force, without an almost universal subversion of our legal superstructure in respect to the titles to real property.

It is upon this view of the innumerable obstacles to confounding *descent* by accepting a real heir as a purchaser, that the present observer has presumed to assert,—that *purchase* and *descent* are conclusions of law upon certain premises, which are the essence of each:—that in the case of *descent* the premises are a state of freehold in the ancestor with a succession to his heirs, whether general or special:—that there is a principle inherent in law, which in such a case ever renders impossible the heir's inhering otherwise than by descent, however strongly and positively

the author of the gift may express an intention to have the heir accepted as a purchaser :—and that intention will no more avail to give to the reality of a title by *descent* the effect of *purchase*, than it will to convert the reality of a title by *purchase* into the legal effect of a *descent*. Upon the very same grounds also the now observer ventures to advance as a further assertion, that the principles, which oppose the commixture of *purchase* with *descent*, are not *altogether expired and obsolete* : but that on the contrary they are *almost in the same state of vigour as they antiently were*. The policy against indulging the creation of new kinds of inheritance, the policy against subverting the legal order of succession, the policy against suffering the sacred distinctions between *descent* and *purchase* to be violated, the policy against removing the great land-marks of the titles to real property, the policy against sacrificing the most positive and imperative rules of our law to the caprice of private intention, and the policy against admitting a precedent of so condemning our system in respect to the law of real estates ; all these policies of our law are not less necessary to be *now* remembered and enforced, than they were centuries ago. There ought to be bulwarks to curb the encroaching and dangerous spirit of innovation *at all times*.

Here then the present observer begs leave to ask, what are the barriers which our law places between *descent* and *purchase*, in order to guard against all encroachment of the latter upon the former ? If the principle of our law against joining the effect of *purchase* with the reality of succession be admitted, it must also be agreed, that our law must have provided some effectual impediment to prevent their incorporation. But unless the rule in Shelley's case is a part of that impediment, the present observer is at a loss to know where a complete barrier is to be found.

It is a positive rule of our law, that a man cannot give a fee simple to his own right heirs as purchasers, either by legal conveyance, by conveyance to uses, or by devise (a). By this it is meant, that where the ancestor by any sort of conveyance appoints, that at his death his heirs shall by gift from him come to that very inheritance, which the law of descent or succession throws upon the heirs at law, it is construed as a vain and fruitless attempt to give that to his heirs, which the law itself vests in them ; it is speaking what the law speaks ; and to give effect to such a designation by every ancestor, and so to enable him to convert the title to his heirs by *descent* into a *purchase*, might lead to a gradual undermining of the whole law of inheritance. Lord Hobart, in his report of the case of *Couden and Clerke*, descants learnedly upon this rule, and

(a) Hob. 32: Co. Lit. 22. b.

and proves its power in various instances. Now it is this rule, which, as the now observer conceives, forms one of the barriers to guard descent to heirs from being made to operate by purchase. It amounts to a prohibition upon the ancestor again making his heirs purchasers, by giving at his death what the law confers without his aid; and puts an absolute negative upon attempts to controul the law of succession in that respect.

But if our law had stopped here, its policy against blending the effect of purchase with descent would have been imperfectly guarded; for the last mentioned rule applies only to the acts of an ancestor as between him and his own heirs. It was therefore requisite to have a like barrier, as to acts between persons not standing towards each other in the relations of ancestor and heir. Otherwise upon every new gift or conveyance of an inheritance by its owner to a new proprietor, it might have been made part of the original terms of the donation, that it should be incident to the estate passed to the donee and his heirs, that his heirs should notwithstanding come in by purchase. It is for prevention of this latter evasion of the policy against confounding the law's distinction of descent with purchase, that the rule in Shelley's case was calculated. For what is the short amount of it? It is simply this, that no man shall raise in another an estate of inheritance, and at the same time make the heirs of that person purchasers. It gives the law to both kinds of inheritance equally; because the succession to *fee simple* and the succession to *fee tail* are both equally considered as titles by legal succession, though the one is, by descent: the difference being only, that the inheritance in *fee* existed before the statute *de donis*; and that the inheritance in *tail* was a modification of the former by that statute, in order in some degree to revive the antient favour to the perpetuity of entails, by substituting that new species of inheritance ever since called an *estate tail*, for the more feeble species of entail known in our law by the name of *fee conditional*. In thus equally guarding descents on *fee simple* and *fee tail* from the effect of purchase, the rule in Shelley's case only conforms to the consideration of them by our law in other respects; for it is certain, that the heir taking by succession in *tail* is construed to come in by operation of law and by descent, as well as the heir taking by succession in *fee simple*; and this similarity holds, not only as to the privileges of descent, such as *tolling of entry*, but also as to other consequences, so far as is consistent with the unalienable quality of an estate tail without the aid of fine or common recovery to bar it. In fact, the rule in Shelley's case is nothing more than a negative upon an *indirect* mode of introducing a reversioner heir in the *assumed* form of a *purchaser*. If it had been attempted *directly* to make a *purchase* of a *descent*, by giving a

simple

ple, or fee tail, and then qualifying either estates by appoint-
 ing that the heirs should take by purchase, it would have been
 to rank a contradiction of our law to have had a chance of suc-
 ceeding. The rule in Shelley's case was calculated to defend the
 law of descent against an *indirect* evasion of its effects. Is it not
 the very essence of an estate of each species of inheritance,
 that it should be enjoyed by the person seised of it for his life,
 with a benefit of a succession at his death to his heirs general or
 special, according to the nature of the inheritance? Is not
 the expression, that the ancestor shall have *for his life only*,
 with a succession to his heirs at his death, a mere *nominal* differ-
 ence from an estate to one and his heirs or the heir *in his body*,
 except that it aims to qualify the inheritance, by refusing powers
 alienating, which the law has inseparably annexed to such
 estates? Is it not also the plain meaning of the rule to resist the
 possibility of constituting a real estate of inheritance under
 the *show and disguise* of a lesser estate?
 Thus then at last it is discovered, that there is latent in the
 rule in Shelley's case, a principle, which constitutes it one of
 the great barriers or outworks provided by our law to guard des-
 cent from being confounded with *purchase*, and to obstruct an-
 nouncing to the essence of the former the discordant effect of the
 latter. In other words, the rule in Shelley's case, that *words of*
inheritance grafted upon a preceding estate for life shall operate by
limitation and not by purchase, with the rule, that *the*
ancestor shall not raise a fee simple to his own right heirs, is the
 main fortification for defending our law of descents against all
 invasion by private intention. *Singly*, each of these rules would
 have been an inadequate and incomplete defence; because each
 protects only one half of the citadel. Operating *conjunctively*,
 they so guard the policy of descent in all its essential branches,
 that to make it unassailable at all points. Whilst, therefore, these
 outworks are steadily maintained, our law of inheritance and des-
 cent may remain inviolate. But should these main parts of the
 defences be once undermined or surrendered, who can say, that
 subordinate and inferior defences will suffice for its protection.
 If this be a true developement of the principle of the rule in
 Shelley's case, all pretence for any longer arguing upon it, as a
 mere technical rule of interpretation, as a mere artificial mode
 of construing the intention of a will or other conveyance, must
 speedily wholly vanish, and the rule will re-assume its original
 rank and importance. Instead of being ever again mistaken as
 a rule for spelling out and executing private intention, it will be
 speedily recognized as a check to restrain private intention
 from levelling the distinction of inheritance. The disguise of
 the

the rule by modern glosses being thrown off, its true features break forth and are fully seen ; and from being dishonoured a *servant* and *slave* to *private intention*, the latter must shrink from its vain pretension to superiority, and acknowledge the rule to be its *absolute lord and master*. Firm and immoveable in its claim of sole empire, and looking down on private intention as its lawful subject, the rule will neither give nor accept any terms of capitulation. It proudly disdains all compromise of differences ; participation of power. Here, if the rule could speak for itself it would strongly exclaim to private intention, *AUT CASSUS* *AUT NULLUS*.

If too, this deduction be agreeable to the real origin and nature of the rule in Shelley's case, what becomes of all the reasoning from intention ? Thus explained, the rule in Shelley's case can no longer be treated as a *medium*, either for finding out intention, or for assisting to execute it. On the contrary the rule supposes the intention already discovered, and to be, that the conveyance in question has first given to some person an estate of freehold, and then superadded a succession to the heirs general or special of that same person, by making him or her the ancestor, *terminus*, or *stirps*, by reference to which the whole generation and posterity of heirs is to be accounted. Whether conveyance has or has not so constituted an estate of freehold with a succession engrafted upon it, is a *previous* question, which ought to be adjusted, before the rule is thought of. To refer that point is not the office of the rule in Shelley's case ; nor from its nature can it contribute any assistance whatever. Therefore the ordinary rules, for interpreting the language of wills and other conveyances, should be resorted to ; and then being appealed to, it will appear, that there is no more of objection to a reasonably liberal allowance for imperfect, inaccurate, and artificial language, in the case of a gift or devise to one for life with remainder to heirs of the body or heirs, than there is in other cases, where the sense of technical phraseology is to be determined upon. Surely the rules of interpreting words must be the same throughout. If a single word or a whole sentence by habit obtained an appropriate sense, the law ought to prefer it in favour of that sense in preference to any other ; unless from other passages in the same instrument, or from some peculiar circumstances attending the case, there is evidence sufficient to satisfy the mind of the judge, that the author of the instrument under consideration really intended to convey a different meaning. For the sake of preventing the assumption of a boundless and arbitrary discretion, it is fit, that great respect should be shewn to former decisions as to the weight of evidence requisite to repel the legal or technical sense of words. But some discretion must necessarily be left ; because to it

that men shall only use words in one certain sense would be a monstrous tyranny; and there is such an infinite variety in the language and circumstances which may occur to distinguish one case from another, that, to lay down one general rule of interpretation so absolute as to be indispensable, would be making legal interpretation to torture like the bed of the fabulous Attic robber Procrustes, and so every instrument would be cruelly stretched or curtailed into the same meaning. All this plain sense as to the interpretation of words is, and more or less ever has been, the language of our judges in deciding upon conveyances and written instruments of every kind, with however a peculiar extension of indulgence to last wills and testaments. But the process of benignant interpretation is no part of the rule in Shelley's case. What the donor or testator means by *heirs*, or *heirs*, or *heirs-male of the body*, or *issue*, should be first adjusted, without the least reference to or thought of the rule. Till that meaning shall be settled, it is uncertain, whether the rule in Shelley's case may not be quite a foreign consideration.—When, indeed, it is once settled, that the donor or testator has used words of inheritance according to their legal import; has applied them intentionally to comprize the whole line of heirs to the tenant for life; has really made him the *terminus* or ancestor, by reference to whom the succession is to be regulated; then too it will appear, that being considered according to those views of policy, from which it originated, it is perfectly immaterial whether the testator meant to avoid the rule or not; and that to apply it and to declare the words of inheritance to be words of *vestition*, to be words vesting an inheritance in the tenant for life, and to be words vesting a remainder in fee or in tail in him, the ancestor and *terminus* to the heirs, is a mere matter of course. There is however a distinction to be remembered with respect to the manner of the rule's operating. If such inheritance remainder be *immediate* to the estate for life, it will merge therein, and constitute one entire inheritance in possession. It is as clear, that if such remainder be only *mediate*; that is, if, between the estate for life and the remainder to the heirs general special, there be interposed an estate of freehold, whether *expressly* to preserve contingent remainders, as in *Coulson and Coulson*, *impliedly*, as in *Perrin and Blake*, or an estate either of freehold inheritance for any persons beneficially or otherwise; in all these cases, the estate of the tenant for life is prevented from co-extending with the remainder to his heirs, and consequently he has an estate for life with a vested but unmerged remainder in tail in fee, according to the kind of heirs described. But between these two modes of operation, there is more of name and form than

than of reality and substance : for, according to both, the tenant gains the same power over the inheritance, and of defeating the entail, if there be one.—On the other hand, if it shall be decided, that the testator or donor did not mean, by the words of inheritance after the estate for life, to use such words in their full and proper sense ; did not mean to involve the whole line of heirs to the tenant for life, and to include the whole of his inheritable blood ; did not mean to engraft a succession on his preceding estate, and to make him the ancestor or *terminus* for the heirs ; but, instead of this, intended to use the word *heirs* in a limited, restrictive, and untechnical sense ; intended to point at such individual person, as should be the heir, or heir of the body, of the tenant for life at the moment of his decease ; intended to give a distinct estate of freehold to such single heir, and to make his her estate of freehold the ground-work for a succession of heirs ; to constitute him or her the ancestor *terminus* and stock for the succession to take its course from : in every one of these cases, if the premises are wanting, upon which only the rule in Shelley's case interposes its authority ; it is clearly a case, in which the remainder to the heirs of the tenant for life, having the premises belonging to a *purchase*, cannot enure by *limitation or descent* ; and the rule in Shelley's case becomes quite extraneous matter.

Here then a still further advance is made with the present subject.—From the preceding considerations it was to be collected that the principle of the rule in Shelley's case was incapable of bending to intention ; that it was a rule of *public policy* ; and that it must cease to exist, when *private intention* shall cease to be governed by it.—But in this last view of the rule, it is shewn to be no less facile, certain, and invariable in its application, than is absolute in its power. When the reasons and principles upon which the rule became incorporated into our complex though justly admired system of law about real property, are enquired after ; when the title to the empire the rule claims is investigated to the depth, remoteness and antiquity of its foundations must unavoidably cause some trouble, some exertion of mind, to the most discerning and profound of modern lawyers. The prime sources of great navigable rivers are seldom to be traced without a long laborious and painful research. But the power of the rule being once proved and admitted, the most juvenile and superficial of lawyers may in general without the least difficulty know when and how that power ought to be exerted : for the winding up of a watch is scarce a more quick and facile operation. The previous enquiry is surely of all juridical questions the most simple, being, as before appears, nothing more than, whether, in a remainder to the *heirs*, either general or special, of a prede-

ing tenant for life, it is the meaning of the instrument to include the whole of his inheritable blood, the whole line of his heirs; or to design only certain individual persons answering to the description of heirs at his death. If the former is the sense, the rule always applies; and by vesting the remainder in the tenant for life forces it to operate by limitation, even though the instrument should contradictorily and inconsistently add in express terms, that the remainder shall operate as a contingent one, and enure so as to make the heirs purchasers. If the latter sense is adopted, the rule is as invariably foreign to the case; and the remainder consequently is contingent till the death of the tenant for life, upon which event his heir takes it by purchase. This being so, the whole doctrine resolved into so small a compass, that it seems wonderful, how often the frequency of the most subtle disputation, or the exertions of the most profound juridical learning, could raise mist or the subject of such a subject abstruse, obscure, and entangled. Considered then in this plain manner, and being thus restored to original simplicity, the rule will again shine forth with full and instant lustre, and so will again faithfully and perpetually serve as an unerring guide to judges and lawyers. But if it shall be in that state of dimness, which it is the design of these observations to dissipate, the rule must ever cause trouble and perplexity to the understandings of all lines of the profession. If the present observer's idea of the rule is well founded, the doctrine upon it will be so shortened and simplified, that a moment's consideration will suffice to decide almost upon every case which is proposed; and it can rarely happen, that the least reference to books should be necessary. But if his idea shall be rejected, as his mind feels the subject, the learning of the rule must be hunted for through volumes of reports, the bulk of which in a continuance of the cause will be ever on the increase; and the rule must still submit to the reproach of being a species of professional mystery. Upon the whole, therefore, so far as principle of the rule is concerned, it seems warrantable to affirm, that the rule, being taken in its natural, simple and undisfigured state, will scarce leave room for any contention whatever; that being received with its artificial superinductions, it must continue to be the fruitful source of litigations without number.

It now remains to examine how far the turn and import of the decided cases, and of the other authorities both at law and in equity, accord with the preceding exposition of the rule in Shelley's case. It may also be proper to consider various objections, which are likely to be made to the present-observer's manner of explaining

explaining the rule; more especially the objection, which may be raised from the liberty taken with the rule in our courts of equity, when they are deciding upon equitable entails.—Both of these enquiries are so essential to the full investigation of the true doctrine in respect to the rule in Shelley's case, that without them the mind cannot receive complete satisfaction.

But *here* the present observer cannot forbear making a pause.—Hitherto he has proceeded with his subject in terms of considerable freedom, and in a style so strong, as to be excusable for nothing less than a confidence inspired by the generous candour of the superior persons to whom he is addressing himself. Yet great and liberal as that candor is, he begins to hesitate about trying it further. Nay, on a review of the lengths into which a sense of it has already carried him, he almost doubts, whether he ought not to suppress what has now escaped from his pen. He is not sure, but that he may be told, that from his exuberance of zeal for the rule in Shelley's case he has been betrayed into perfect delusion; and that the doubts and difficulties, which disturb his mind, have not the least existence elsewhere. If there be the least ground for apprehending that this should be the language towards him, he stands already too much committed. With such an alarm of danger upon his mind, however sudden it may have come, it would be extreme indiscretion to hazard himself still further, without first waiting to inspect more thoroughly the ground upon which he stands. In the opinion of the present observer, all controversial writing, more particularly on the very serious and solemn topics of law, unless it be to effectuate some real and substantial good, is an indefensible employment of time. It behoves him then to have especial care how he takes any share in an *ideal* controversy. Had not this useful check occurred to him so recently, that he could not with decency retreat from the whole of his original intention, even the first part of his observations upon the doctrine in question would probably have been spared. As his mind now feels affected there is not much probability of his adventuring himself further on a subject, which to his cost perhaps he may find of too extreme a delicacy to be touched by one of his humble description. When he began these observations, his spirits were raised by hopes of contributing his mite towards the final elucidation of an important subject, and of so intitling himself to a proportion of indulgent praise from the learned profession to which he belongs. But he now fears, that there is danger of having his present labours considered as an officious interposition of himself, where no such inferior assistance was either desired or wanted.

4 END OF THE FIRST VOLUME.

MUSEVM
BRITANNICVM

Copies of Mr. Hargraves Q^y. and of Mr.
Croft's Answers.

Q^y — Where the Crown is interested in an estate
bill, in what stages of the business is it usual
to have the consent of the Crown signified to
each House?

In answering this question, it is requested,
that there may be a separate answer as to the
practice in each house.

Ans^r — Before the bill is read the 2^d time.

Witnesses to be sworn on Friday next
2 o'clock.

The Witnesses will not be wanted for
a fortnight after the bill comes in.

Adams of Boston
to the Honorable the
House of Representatives
in great haste and
without delay
The Board of Directors
of the Boston and
New York and
New England
Steamship Company
has the honor to
acknowledge the
receipt of your
letter of the 10th
inst. and in reply
to inform you that
the same has been
forwarded to the
proper authorities
for their consideration
and that the same
will be reported
to the Board at
their next meeting
which will be held
on the 15th inst.
Very respectfully
Yours
J. H. Adams

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on the 15th inst.
Very respectfully
Yours
J. H. Adams

...from the margin of Dyoni Reported. of 1600.
Co. 165. b.

And; renewed & adjudged in the great case of currants Mich. 4. Ann. that an
imposition of 10^d. on currants by queen Elizabeth, & another imposition by James of
16^d. 5. 6. more on every hundred weight; ~~were~~ were lawful. The reasons were these. The king
has absolute power, as well as an ordinary one; absolute, as in war, peace, coin, trade, &c. the
law in such cases as this is not to be searched in books of the law; but out of the president
of the exchequer. It is grounded in a policy ^{secret}. Impositions on wool, &c. was not
by any statute wholly, but by prerogative merely. It has been increased often
to 40^d. a sack, & diminished again at the suit of the commons giving a consideration
for it. *It fortiori* may ^{the king} ~~may~~ impose a weight on foreign commodities. The
import on wine was laid 16. 8. 1. & the collector ^{charged} with it, as appears in the exchequer
of ^{it} ~~the~~ ^{which} ~~that~~ was increased to 17. in the time of Hen. 8. & by queen
Mary to 4 marks: & wine is more necessary than currants, & therefore &c.
Another reason is, because it is a burthen ^{not} to the commonwealth, but to ^{delicete} ~~delicete~~
months. And it was agreed by the barons, that the king may restrain his
subjects from going beyond sea, or from carrying or sending their goods beyond sea;
for these goods are a burthen to the commonwealth. Also they agreed, that he may
prohibit the import of foreign commodities; & for the same reason he may
say, that the import shall be on such a condition of payment or otherwise.
And ~~these~~ ^{these} the ports are the gates of the sea; & there is the same reason to
say for coming within them for ^{to pay} ~~safe~~ ^{passage} ~~passage~~ or for murrage or pontage &c. The
statute of H. R. 2. c. 14. wasouched, Item that no impositions or charge be put
upon wooll, leather or woolfels, other than the custom of a subsidy granted
to the king in this present parliament; & if any be the same shall be repealed
annulled, as it was another time ~~by~~ ^{ordained} by statute, ^{saving always to the} ~~the~~
king his ancient right; which is explained to be imposing when occasi-
on serves, because other than excludes from this saving the custom
&c. And with saying that he may grant a safe conduct to a stranger of the kingdom
in England & do this to 10000. or so many that the realm may be seized, it is too
injurious a suspicion, & the king ought to be the guide & rule of his
own prerogative. And Fleming chief baron says also for law, the
king's prerogative power over trade as the cases, therefore over particu-
lar merchandize as the effect; for he may ~~do~~ ^{do} as was done by king

probantur Regnare. And he said that the imposition was not on the
goods of the kingdom domi but on a commodity of the ~~kingdom~~
foris; not on our own, which by way of objection was said to be
done, but on ^aforeign commodity coming into his ports; as like so
as there is no toll for pontage or murege on the highway, but
on a bridge &c. And if foreign princes

Widow's Marriage. 74. ^{in p. 239. West. the}
is a child in Marriage
Cases cited.

A.

L.

B.

M.

C.

N.

Constable, Sir Henry 26.
Row, Sir Jackville. 34

North Sir Henry. 27.

D.

E.

F.

G.

H.

I.

K.

